TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1954

No. [redacted]

WALLACE BENEDICT, AS RECEIVER IN BANKRUPTCY OF THE HUB CARPET COMPANY, PETITIONER

vs.

AARON RATNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 04, 1955.

CERTIORARI AND RETURN FILED JUNE 17, 1955.

([redacted])

(28,949)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 400.

WALLACE BENEDICT, AS RECEIVER IN BANKRUPTCY OF THE HUB CARPET COMPANY, PETITIONER,

vs.

AARON RATNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Record from the district court of the United States for the southern district of New York	1	1
Petition for appeal	1	1
Citation	4	2
Order to show cause read in support of motion	5	3
Affidavit of Aaron Ratner read in support of motion	7	3
Exhibit I—Agreement of May 23, 1921	10	5
Affidavit of Wallace Benedict read in opposition to motion	13	6
Exhibit A—Minutes of board meeting, May 23, 1921	20	10
B—Minutes of board meeting, January 3, 1921	21	11
C—Minutes of board meeting, September 12, 1921	22	12
D—Ledger entries	22	12
Affidavit of Selden Bacon read in opposition to motion	24	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1922.

	Original.	Print.
Exhibit E—Testimony of Aaron Ratner	44	25
Replying affidavit of Aaron Ratner read in support of motion	59	35
Exhibit 2—List of checks	65	38
Replying affidavit of Selden Bacon read in opposition to motion	69	41
Opinion, Hand, J	71	42
Decree	76	44
Assignment of errors	79	45
Notice of filing bond	86	49
Bond on appeal	87	49
Præcipe for record	91	52
Stipulation as to record	93	53
Clerk's certificate	94	53
Stipulation as to exhibit, &c	94*a*	54
Opinion, Mayer, J	95	55
Judgment	106	60
Clerk's certificate	107	61
Writ of certiorari and return	108	61

1 *Petition for Appeal.*

District Court of the United States for the Southern District of New York.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, who was respondent in the above entitled controversy, arising in the above entitled bankruptcy proceeding, conceiving himself aggrieved by the order and decree made and entered in the above entitled proceeding on the 21st day of November, 1921, directing this respondent to account to the Petitioner Aaron Ratner for all sums received by this respondent as such Receiver upon any accounts contained in any of the lists of accounts transmitted to Aaron Ratner, and that the Bankrupt or its Trustee herein execute a formal assignment for the balance of any and all such accounts up to the extent of the unpaid advances of said Aaron Ratner to the Bankrupt, together with interest thereon from the date of such advances and denying the petition of this Receiver that an order be made herein denying said application of said Aaron Ratner and ordering and directing the said Aaron Ratner to pay this respondent as such Receiver forth-
2 with all the sums so received by said Ratner from the Hub Carpet Company since the 17th day of September, 1921, and all the receivables so turned over to him since that date under the agreement under which said Ratner claimed and that said Ratner be specifically restrained and enjoined from interfering with the Receiver's collection of any of the accounts receivable of the Hub Carpet Company, and from making any further claim under the instrument asserted by him, does hereby appeal from said order and decree of November 21st, 1921, and from each and every part thereof to the United States Circuit Court of Appeals for the Second Circuit for all and several the reasons specified in his assignment of errors which is filed herewith, and said Wallace Benedict as such Receiver prays that this, his appeal, may be allowed, and that citation issue thereon as provided by law, and that a transcript of the record and proceedings and papers upon which said order and decree was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit, and your petitioner further prays that the proper order touching the security required of your petitioner to perfect its said appeal be made.

Dated, November 21st, 1921.

SELDEN BACON,
Solicitor for Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, Respondent and Petitioner for Leave to Appeal.

3 And now, to-wit, this 21st day of November, 1921, upon consideration of the foregoing petition, it is on motion of Seldon Bacon, Solicitor for Wallace Benedict as Receiver in Bankruptcy of Hub Carpet Company, the petitioner for appeal,

Ordered by this Court that the appeal prayed for therein be and the same is hereby allowed and shall operate as a supersedeas upon such petitioners filing a bond in the sum of Five Hundred Dollars with sufficient sureties to be conditioned as required by law.

Dated, November 21st, 1921.

L. HAND,
U. S. District Judge.

(Endorsed:) Filed Nov. 21, 1921. 10 A. M.—U. S. District Court, S. D. of N. Y.

4 *Citation.*

United States of America to Aaron Ratner, Greeting:

You are hereby notified that in a certain controversy arising in the matter of Hub Carpet Company, Bankrupt, and proceeding in equity in the United States District Court in and for the Southern District of New York wherein you, said Aaron Ratner, are complaining petitioner, and wherein Wallace Benedict as Receiver of Hub Carpet Company, Bankrupt, is respondent, an appeal has been allowed to the said respondent therein from the decree therein entered in said District Court of the United States for the Southern District of New York on the 21st day of November, 1921, to the Circuit Court of Appeals for the Second Circuit.

You are hereby cited and admonished to be and appear in said Circuit Court of Appeals at the Federal Court House in the Borough of Manhattan, City of New York, and State of New York, in said Southern District of New York, thirty days after the date of this citation to show cause, if any there be, why the order and decree aforesaid should not be corrected and speedy justice done the parties in that behalf.

Witness the Hon. Learned Hand, Judge of the United States District Court for the Southern District of New York this 21st day of November A. D. 1921.

L. HAND,
U. S. District Judge.

(Endorsed:) Service of a copy of the within citation is hereby admitted this 22nd day of November, 1921. Louis S. Posner, Solicitor for Appellee. Filed Nov. 25, 1921 2:20 P. M. U. S. District Court, S. D. of N. Y.

5 *Order to Show Cause Read in Support of Motion.*

United States District Court, Southern District of New York.

In the Matter of THE HUB CARPET COMPANY, Alleged Bankrupt.

Upon the annexed affidavit of Aaron Ratner, and the exhibit thereto attached, and upon all the papers and proceedings had herein, the Receiver for the above named alleged bankrupt or his attorney, is required to show cause before me or one of the Judges of this Court at a Term to be held in Room 235, Post Office Building, Borough of Manhattan, City of New York, on the 24th day of October, 1921, at 10:30 A. M. in the forenon, or as soon thereafter as counsel can be heard, why an order should not be made herein directing the said alleged bankrupt, the said Receiver, his and its agents, servants and employees, to turn over, endorse and deliver unto the said Aaron Ratner, any and all checks, moneys, notes or payments made on account of or arising from or in connection with the bills and accounts receivable of the above named Hub Carpet Company, alleged bankrupt, until together with the amounts heretofore collected by the said Aaron Ratner, a total of such payments received by him shall amount to Thirty thousand dollars ($30,000)
6 with interest and costs and disbursements, all in accordance with the terms and conditions of the contract between The Hub Carpet Company and Aaron Ratner annexed hereto, dated May 23rd, 1921, and why the said Aaron Ratner should not have such other and further relief as to this Court may seem just.

Service of a copy of this order with the papers hereto attached shall be sufficient if made upon the Receiver herein or upon Seldon Bacon, his attorney, on or before October 20th, 1921, at 2:00 o'clock P. M.

Dated, New York, October 19th, 1921.

LEARNED HAND,
U. S. D. J.

7 *Affidavit of Aaron Ratner Read in Support of Motion.*

United States District Court, Southern District of New York.

In the Matter of THE HUB CARPET COMPANY, Alleged Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Aaron Ratner, being duly sworn, deposes and says: On or about May 23, 1921, an agreement in writing was duly entered into between The Hub Carpet Company, the above named alleged bankrupt and myself, copy of which is annexed hereto, marked Exhibit I and made part hereof. Following the making of this agreement, I advanced

the sum of Fifteen thousand dollars ($15,000) on the 24th day of May, 1921, and later, and on July 1st, an additional sum of Fifteen thousand dollars ($15,000), making a total of Thirty thousand dollars ($30,000). From time to time as the notes given me for this total of Thirty thousand dollars ($30,000) became due, they were renewed by me. I relying upon the agreement in question and the security afforded thereby, the last notes for such renewal which were given to me being dated, one for $15,000 on July 1, 1921, payable October 1, 1921, and another for $15,000, dated July 24, 1921, due September 24, 1921.

8 On or about May 24th, and monthly thereafter, to and including September 24th, 1921, The Hub Carpet Company delivered to me a statement of its accounts from its books, representing the accounts assigned to me, pursuant to the agreement, and these were collected from time to time by the Hub Carpet Company and retained to its own use, until shortly before the 24th day of September, 1921, when I began receiving checks representing payments of accounts included in the lists delivered to me. The total amount which I have thus collected is the sum of Eleven thousand five hundred and eighty-one and 75/100 ($11,581.75) Dollars, leaving a balance due to me of Eighteen thousand four hundred and eighteen and 25/100 Dollars ($18,418.25), with interest, no part of which has been paid. I also received notes and trade acceptances which have not yet, however, been paid, and which aggregate in face amount the sum of Two thousand two hundred twelve and 66/100 Dollars ($2,212.66).

On or about September 26, 1921, an involuntary petition was filed against the above named Hub Carpet Company, and on or about September 26, 1921, Wallace Benedict, Esq., was appointed Receiver.

My attorney, Louis S. Posner, Esq., of 15 Broad Street, Borough of Manhattan, City of New York, thereupon gave notice to the Receiver by letter dated September 27th, 1921, of my rights in the premises, and demanded that the moneys received on the accounts of the Hub Carpet Company be turned over to me in accordance with the terms of my agreement, which demand however, was refused.

9 Since the petition in bankruptcy was filed herein, I have been examined in behalf of the Receiver under Section 21-a of the Bankruptcy Act before Hon. Harold P. Coffin, Referee in Bankruptcy.

I respectfully ask the Court to direct the Hub Carpet Company and the Receiver, to turn over and account to me for any and all moneys received by it and by him in payments of accounts of customers of The Hub Carpet Company until the total so paid to me shall, with the amount already received by me, amount to the sum of Thirty thousand dollars ($30,000) with interest due as aforesaid.

No previous application for this order has been made.

AARON RATNER.

Sworn to before me this 19th day of October, 1921.
HELEN LEVIN,
Notary Public, Kings County.

Kings County Clerk's No. 162.
Kings Co. Register's No. 2178.
Certificate filed in New York County.
Clerk's No. 462; Register's No. 2367.
Commission expires March 30th, 1922.

10 EXHIBIT I.

This agreement made this 23rd day of May, Nineteen Hundred and Twenty-One, between the Hub Carpet Company, a corporation of the State of New York, party of the first part, and Aaron Ratner, of 1804 Arthur Avenue, New York City, party of the second part, witnesseth:

Whereas, the party of the first part is the owner and is engaged in the wholesale floor covering business at No. 23 West 24th Street, in the City, County and State of New York, and represents to the said party of the second part that it is solvent and has assets over all liabilities amounting to over Sixty Thousand Dollars ($60,000) and that the said party of the first part desires a loan of not exceeding the sum of Thirty Thousand Dollars ($30,000) for the purpose of properly carrying on its business,

And whereas, the party of the second part relying upon the representations herein set forth, has agreed from time to time to make loans to the party of the first part in a sum not exceeding Thirty Thousand Dollars ($30,000), said loans to be evidenced by promissory notes of the party of the first part made to the party of the second part,

Now therefore, know all men by these presents, That we, The Hub Carpet Company, a corporation organized under and by virtue of the Laws of the State of New York, in consideration of the aforesaid agreement and covenant and in consideration of one dollar and other good and valuable consideration to us in hand paid and to us to be paid in the manner hereinbefore set forth, have sold, assigned, transferred and set over and by these presents do sell, assign,

11 transfer and set over unto Aaron Ratner aforesaid, as collateral security for any sum or sums of money that the said Aaron Ratner shall loan to us from time to time in pursuance to the terms of this agreement, all sums of money, accounts and demands due and owing to us on our books of account, and such moneys, accounts and demands that will become due and owing to us, including our books of account which may accrue and become due to us in the future in the ordinary course of business; and we do hereby constitute the said Aaron Ratner our attorney, in our name, and for his own use, to demand, prosecute, sue for, compound, release and discharge the same at his own costs and charges, as fully as if we were present acting therein; and we do hereby ratify and confirm all his lawful acts in the premises.

We, the Hub Carpet Company, further covenant and agree to fully disclose our business and financial conditions at any time the said Aaron Ratner so demands and hereby authorize him to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued.

We further covenant and agree with the said Aaron Ratner on demand to turn over to the said Aaron Ratner any and all payments made to us by our debtors and to be applied by him in payment of any obligations due him, notwithstanding that the time for the payment of said obligations held by him at that time has not in fact become due and payable.

12 In witness whereof, we have hereunto set our hands and seals the day and year first above written in pursuance to a resolution of the Board of Directors of the Hub Carpet Company held on the 23rd day of May, Nineteen Hundred and Twenty-One.

HUB CARPET COMPANY.
By ABNER RATNER,
Vice President.

Signed, sealed and delivered in the presence of
—— ——.

Attest:
EDWARD A. LIFSON,
Secretary.

(Endorsed:) Copy received October 20, 1921 at 11.25 A. M. Selden Bacon, Attorney for receiver. Filed Oct. 24, 1921, 12m. U. S. District Court, S. D. of N. Y.

13 *Affidavit of Wallace Benedict Read in Opposition to Motion.*

United States District Court, Southern District of New York.

In Bankruptcy.

No. 30396.

In the Matter of HUB CARPET COMPANY, Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Wallace Benedict, being duly sworn, deposes and says that he is the Receiver duly appointed herein by order of this Court on the 26th day of September, 1921, and that he filed his bond as such Receiver duly approved on the same day, and has ever since been and now is the duly appointed, qualified and acting Receiver of said Hub Carpet Company.

Deponent further says that on the 17th day of October, 1921, the above named Bankrupt was adjudged a bankrupt by decree of this court entered on that day.

Deponent further says that he has read the affidavit of Aaron Ratner herein verified the 19th day of October, 1921, annexed to the order to show cause herein why deponent should not be directed by this court to turn over, endorse and deliver to said Aaron Ratner any and all checks, moneys, notes and payments made on account of, or arising from, or in connection with bills and accounts receivable of the Bankrupt until, together with the amounts heretofore collected by said Ratner, the total of $30,000. with
14 interest and costs shall have been received by said Aaron Ratner.

Deponent further says that upon his appointment as such Receiver he went to the store of the above named Bankrupt at No. 23 West 24th Street, New York City, and took possession thereof a little before noon, and that shortly afterwards Abner Ratner, the son of said Aaron Ratner, who was Vice-President of the Hub Carpet Company, and who was there when deponent arrived, and did in deponent's presence hand to deponent's counsel, Selden Bacon, Esq., of New York City, a paper which was a copy of Exhibit I annexed to said affidavit of Aaron Ratner, save and except that the said copy did not contain the following matters appearing on the last page of said Exhibit:

The word "hereunto" on that page was "hereto."

The signature "Abner Ratner" was not thereon, nor was the signature "Edward A. Lifson."

Later about four o'clock in the afternoon of September 26th, said Abner Ratner came into the store with his father, said Aaron Ratner, and deponent together with his said counsel then and there had a conversation with said Aaron Ratner and said Abner Ratner respecting the said instrument. In response to inquiries by Mr. Bacon Mr. Aaron Ratner stated that the original instrument had been delivered to him about the 23rd or 24th of May, 1921; that no list of the accounts or receivables thereby assigned was annexed to the instrument, but that he did shortly afterwards receive a statement of the receivables of the Hub Carpet Company. That none of those receivables were taken over by him at that time, and that he each month thereafter received a statement of the receivables from the Bankrupt showing that they had collected some of the
15 accounts shown on the previous statement and acquired some of the receivables. That he said Aaron Ratner received none of such payments but allowed the Hub Carpet Company to go on using the sums collected on such receivables until the 17th day of September, 1921, and that this was done (and this was stated twice over by Mr Ratner in answer to Mr. Bacon's questions), pursuant to a clear and definite understanding at the time of the execution of said Exhibit I that the Bankrupt Company should be allowed to use the receivables until Mr. Ratner became disturbed about his recovering his claim, and when he made any demand the receivables should be turned over to him. That he made no such

demand until the 17th of September, 1921, after which he had so taken over between $13,000 and $14,000.

Deponent further says that on the minute book of the corporation deponent has found minutes of a meeting purporting to have been held on the 23rd day of May, 1921, of which minutes a true and correct copy is hereto annexed, marked Exhibit A and hereby made a part of this affidavit.

Deponent further says that on the ledger of said Hub Carpet Company appears an account of the sums so collected and turned over to said Aaron Ratner after September 17, 1921; such items are set forth in Exhibit D, hereto annexed.

Deponent further says that it is ascertained from the books and papers of the Company and from statements made by the officers of the Company, namely, Abner Ratner, the Vice-President, Edward A. Lifson, the Secretary, and Irving Fieldman, Treasurer of the Bankrupt, and deponent believes, that the stock of the Company was owned by Albert Lifson who was President of the Company, his son, Edward A. Lifson, and his two sons-in-law,
16 said Abner Ratner and Irving Fieldman. That the great bulk of the indebtedness of the Bankrupt for merchandise was incurred on the strength of a statement of its assets and liabilities on the 31st day of December, 1920.

Immediately after the date of said statement on the 3rd day of January, 1921, a meeting was held of the directors at which a resolution was passed and contained in the minutes of the said meeting, of which a copy is annexed to this affidavit marked Exhibit B and hereby made a part hereof. That subsequently the sums of $5,200., $3,700. and $5,420. were credited respectively to said Edward A. Lifson, said Abner Ratner and said Irving Fieldman, to wit, at the following dates; the sum of $5,200. to said Edward A. Lifson under date of the 1st day of August 1921, the sum of $3,700. to Abner Ratner under date of the 1st day of August 1921, and the sum of $5,420. to Irving Fieldman under date of the 1st day of August 1921. That each and all said sums were at that time charged to the general expense account of the corporation, and thereafter payments were made by the corporation to said Edward A. Lifson, Abner Ratner and Irving Fieldman on account of said respective sums.

Deponent further says that on the 12th day of September, 1921, a meeting of the directors of said corporation was held, and a copy of the minutes of that meeting is hereto annexed marked Exhibit C. That pursuant to that resolution on the 15th day of September, 1921, a mortgage was executed by the above named Bankrupt to V. E. Husbands for $10,000. through the firm of Stamler & Stamler, attorneys-at-law of Elizabeth, New Jersey. That said Stamler &
Stamler deducted $1,000. from the amount of the loan for
17 their services and disbursements in securing the loan and also deducted $2,000. in settlement of an old bill claimed by them against the predecessor company of the Bankrupt, which bill had been standing for a number of years, and remitted the $7,000. balance of the proceeds to the Bankupt. That there were

taxes due on the mortgaged property (this mortgage was a third mortgage) amounting to a little over $4,000. which the Bankrupt thereafter paid out of the proceeds of said loan, and such $7,000. was received by the Bankrupt from said Stamler & Stamler on the 16th day of September, 1921, and on the 17th day of September, 1921, the said Aaron Ratner demanded of the Bankrupt all its receivables. On the 22nd or 23rd day of September, 1921, the Bankrupt by its said officers, Edward A. Lifson, Abner Ratner and Irving Fieldman withdrew from its bank deposit into which it had merged the $7,000. check, the sum of $3,000. which was divided forthwith between said Abner Ratner, said Edward A. Lifson and said Irving Fieldman, $1,000. to each, being applied by them respectively against the balance of indebtedness in their favor created by the credits above mentioned.

Deponent further says that at the beginning of September, 1921, the said Bankrupt was indebted on a note for $20,000 at the Bank of Manhattan Company, which note was endorsed by the said Albert Lifson, and that said note was paid off by the Bankrupt after default in paying indebtedness to outside creditors had been made, whereby said Albert Lifson was discharged from liability on said $20,000. note.

Deponent further says that also subsequent to the first day of September, 1921, said Bankrupt paid to said Albert Lifson a
18 sum in excess of $9,000. on account of indebtedness claimed to be due him.

The Bankrupt, therefore, has, as deponent is informed and believes, been actively engaged in preferring each of its officers and the father of its said Vice-President, Abner Ratner, the petitioner Aaron Ratner.

Deponent further says that prior to the demand by the said Aaron Ratner that the Bankrupt turn over to him its receivables, various creditors of the Bankrupt were pressing it for statements of its condition, and for payment, all of which was well known to the officers of that Company and, as deponent believes, to said Aaron Ratner. That the creditors so pressing the Bankrupt and inquiring into its affairs included W. & J. Sloane, George Nicols & Co., E. W. Poulson & Co. Inc. and Cook's Linoleum Company, whose claims aggregate about one-half or more of the total indebtedness of said Bankrupt, and that a considerable part of the claim of said Cook's Linoleum Company, which was for $37,317.39 had been overdue since the tenth day of September, 1921.

Deponent further says that the said sums of $3,700., $5,200. and $5,420. so claimed by the said Abner Ratner, Edward A. Lifson and Irving Fieldman at the directors' meeting of January 3rd, 1921, and subsequently credited to them were not claimed to be disbursements incurred for the Bankrupt corporation but for predecessor corporations or for services rendered such predecessor corporations. The Bankrupt corporation was organized only in November, 1920, and took over the said business on the 31st day of December 1920.

Deponent further says that among the acceptances and notes taken over by said Aaron Ratner was one for $1,000 from
19 one Sam Herzfeld who is ready and willing to pay the same, but deponent has forbidden his paying the same to the said Aaron Ratner, and the said Aaron Ratner declines to surrender said note to this deponent, and deponent cannot secure the payment of said note or of any of the other of said notes or acceptances held by said Ratner until they are delivered to deponent.

Deponent further says that between the 24th day of May, 1921, and the 15th day of September, 1921, said Hub Carpet Company made collections on its various accounts and notes receivable in excess of $150,000, as shown by its books.

And deponent as such Receiver prays that an order be herein made denying the application of said Aaron Ratner and ordering and directing the said Aaron Ratner to pay to said deponent forthwith all the sums so received by said Ratner from the Hub Carpet Company since the 17th of September, 1921, and all the receivables so turned over to him since that date under his said alleged agreement, and that said Aaron Ratner be specifically restrained and enjoined from interfering with deponent's collection of any of the accounts receivable of the Hub Carpet Company, and from making any further claim under his said pretended assignment, and such relief deponent prays upon this his affidavit and the annexed affidavit of Seldon Bacon.

WALLACE BENEDICT.

Subscribed and sworn to before me this 22nd day of October, 1921.

[SEAL.] O. V. W. HAWKINS,
Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co. No. 4.
N. Y. Co. Register's No. 2002.

20 EXHIBIT A.

Meeting of the Board of Directors Held on the 23rd Day of May, 1921, at the Office of the Company.

All the Directors were present. The minutes of the last meeting were read and approved.

Mr. Irving Fieldman, Treasurer of the Company, reported that he had a talk with Mr. Hayes of W. & J. Sloane Company who suggested that it would be advisable and for the best interest of the company to procure additional sums of money with which to run the business, and that thereupon he through Abner Ratner arranged with Mr. Aaron Ratner of New York City, to borrow from him the sum not exceeding Thirty Thousand ($30,000.00) Dollars, upon the *notice* of the company and the same to be secured by accounts receivable of the company that are now in existence or that in the future may accrue in the ordinary course of business.

After a lengthy discussion, the Officers were authorized to enter into a negotiation and written contract to borrow from Aaron Ratner, the sum not exceeding Thirty Thousand ($30,000) Dollars on the notes of the company, as security to deliver an assignment to the said Aaron Ratner of the books of account of the company, as per the report of Mr. Fieldman, and the Officers of the Company were authorized to execute notes in sums not exceeding Thirty Thousand ($30,000.00) Dollars and also execute an assignment of the books of account of the company as explained by Mr. Fieldman.

Upon motion duly made and seconded meeting adjourned.

EDWARD A. LIFSON,
Secretary.

21 EXHIBIT B.

Meeting of the Board of Directors Held on the Third Day of January, 1921, at the Office of the Company.

The following business was transacted. All the Directors were present and Albert Lifson presided. The Treasurer of the Company read the annual report of the company and the same was ordered filed.

On Motion of Mr. Edward Lifson the following salaries were confirmed for the year 1920. Albert Lifson $15,000.00; Irving Fieldman $7,800.00; Abner Ratner $7,800.00; Edward Lifson $7,800.00.

Mr. Fieldman presented a Bill for disbursements in connection with the management of the business amounting — $5,420.00 the same was referred to the President for examination before direction for the payment of the same is made, and if found to be correct the same shall be paid or credited to the account of Mr. Fieldman. Mr. Ratner presented a bill for disbursements amounting to $3,700.00 and the same course was taken. Mr. Edward Lifson presented a claim against the company for additional services &c., amounting to $5,-200.00 and the same was referred in the same manner as the claim of Mr. Fieldman.

The Treasurer reported that the profits for the year 1920 after paying expenses, excepting the claims above set forth amounted to $8,040.97.

On Motion duly made and seconded the salaries of the officers for the year 1921 were fixed as follows: Albert Lifson $15,000.00 per annum; Irving Fieldman, $10,400.00 per annum, Abner Ratner $10,400.00 per annum and Edward Lifson $10,400.00 per annum, same to be paid in monthly instalments or the monthly salaries to be credited to their respective accounts.

Upon Motion duly made and seconded meeting adjourned.

EDWARD A. LIFSON,
Secretary.

22 EXHIBIT C.

Meeting of the Board of Directors Held on the 12th Day of September, 1921, at the Office of the Company.

All the Directors were present, excepting Mr. Albert Lifson. The minutes of the last meeting were read and approved.

Mr. Irving Fieldman reported that he had made arrangement with the firm of Stamler and Stamler, Attorneys, to borrow from his client, the sum of Ten Thousand ($10,000.00) Dollars on the bond and mortgage of the company covering the property on Market Street, Philadelphia, Pa., which moneys would be absolutely necessary for the purpose of meeting existing obligations. The officers of the company were authorized to execute a bond and mortgage.

On motion duly made and seconded meeting adjourned.

EDWARD A. LIFSON,
Secretary.

EXHIBIT D.

The following is a copy of the ledger entries on books of the Hub Carpet Co. checks, trade-acceptances and notes turned over to Aaron Ratner from September 17th, 1921 to September 26th, 1921 inclusive.

September	19, 1921	.....	$1,364.98
	20,	.....	2,764.68
	21,	.....	506.70
	22,	.....	930.31
	22,	.....	50.00
	22,	.....	56.50
23	22,	.....	777.87
	23,	.....	2,746.58
	21,	.....	133.71
	21,	.....	82.50
	22,	.....	1,000.00
	23,	.....	200.00
	23,	.....	200.00
	23,	.....	492.08
	24,	.....	1,146.96
	24,	.....	197.62
	26,	.....	1,065.30
	26,	.....	157.92
	26,	.....	80.16
			$13,953.27

Of the above items the following were trade acceptances or notes as indicated of the several customers of the Hub Carpet Co.

September 21, 1921,	Note	$133.71
21,	Note	82.50
22,	Note	1,000.00
23,	Note	200.00
23,	Note	200.00
23,	Note	492.08
26,	Trade Accept.	157.92
26,	Trade Accept.	80.16
		$2,346.37

The other items were checks.

24 *Affidavit of Selden Bacon Read in Opposition to Motion.*

United States District Court, Southern District of New York.

In Bankruptcy.

No. 30396.

In the Matter of HUB CARPET COMPANY, Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Selden Bacon, being first duly sworn, deposes and says that he is the attorney for the Receiver herein, and a member of the firm of Duer, Strong & Whitehead, attorneys for petitioning creditors.

Deponent further says that under an order, pursuant to the provisions of Section 21-A of the Bankruptcy Act deponent has examined numerous witnesses, including Valeria E. Husbands, alleged mortgagee of the Bankrupt, Charles J. Stamler and John J. Stamler, the members of the firm of Stamler & Stamler, attorneys-at-law of Elizabeth, New Jersey, Irving Fieldman, Treasurer of the Bankrupt, Abner Ratner, the Vice-President of the Bankrupt, Edward A. Lifson, Secretary of the Bankrupt, and Aaron Ratner, the father of said Abner Ratner, who has procured on order that the Receiver herein show cause before this Court on October 24th, 1921, why the said Receiver should not be directed to turn over all the moneys collected by him on receivables of the Bankrupt to said Aaron Ratner to satisfy a claim of his for $30,000 with interest and costs.

25 Deponent has read the annexed affidavit of Wallace Benedict, the Receiver herein, and confirms fully the statements of said Benedict as to the interview with said Aaron Ratner and Abner Ratner on the 26th day of September, 1921. Said Aaron stated to deponent twice over that the instrument under which he claimed, of which Exhibit I of his affidavit is practically an exact

copy, had been given to him and received with the express understanding that the Bankrupt Company should be allowed to continue to collect its receivables and use the collections in the ordinary course of its business, but that in case said Aaron Ratner concluded at any time that he was insecure he might demand that the receivables be turned over to him, but until then the Company should enjoy and use the same. That no list of the accounts receivable assigned to him was appended to the instrument, but that at about that day a statement was rendered to said Aaron Ratner of the then receivables, and later each month he received a similar statement. That said statements from time to time showed changes in the receivables. Various sums had been collected, none of which had been turned over to said Aaron Ratner, and that other accounts receivable had grown up, and that said Aaron Ratner was perfectly aware that the Bankrupt was using the proceeds of the receivables as collected in its business, and that that was according to the terms of the express understanding at the time the instrument was executed, and the son, Abner Ratner, who was standing by, stated "Yes, that was the clear understanding at the time the paper was executed."

26 Deponent further says that in the examination of Mrs. Husbands she disclosed that she was simply a dummy in the mortgage and had absolutely no interest therein; that she was a clerk in the office of Stamler & Stamler and the mortgage was really taken for a client of theirs, Mr. Henry Piper, who had not been advised of this loan of his money. That he kept about $50,000 all the time which they had authority to lend out on mortgage.

Mr. Charles J. Stamler claimed to know nothing of any of the transactions of his firm with the Bankrupt or anything about the said mortgage.

Mr. John J. Stamler testified that really the loan was not for account of Mr. Piper; that his firm borrowed $50,000 from Mr. Piper with the understanding that they were responsible to Mr. Piper for the return of the loan, and that in substance they had undertaken to use the loan in making various investments, but that the loan was really theirs and not Mr. Piper's. His firm acted as attorneys for the Bankrupt Company from the date of a conversation over the telephone between him and Mr. Edwin Heyes, credit-man of W. & J. Sloane, where Irving Fieldman had referred Mr. Heyes to said Stamler & Stamler. Such conversation as deponent is informed by Mr. Heyes and believes took place on the 16th day of September, 1921. Mr. Stamler asserted that his firm had not previously to that conversation acted as attorneys for the present Hub Carpet Company, but only as procurers of the $10,000 loan for it, which was really loaned by themselves.

Deponent further says that Mr. Irving Fieldman was examined at length and that he stated that the sum of $5,420 claimed by him, mentioned in the resolution of the directors of January 3rd,

27 1921, represented disbursements made by him in connection with the business of the predecessor corporation, the Hub Carpet Company of Pennsylvania, and that the same was true with

regard to the claim of Mr. Abner Ratner for $3,700 and with regard to the claim of Mr. Edward A. Lifson for $5,200.

Mr. Fieldman further stated that the bill of Stamler & Stamler, which was settled at $2,000, which amount they deducted from the $10,000 loan, was a charge for services rendered the former corporation, and this was confirmed by Mr. John J. Stamler.

Said Irving Fieldman, said Abner Ratner and said Edward A. Lifson each admitted on such examinations that they took $1,000 apiece from the corporate treasury about the 22nd or 23rd day of September, 1921, the amount being withdrawn from its bank accounts, the same being distributed equally between Mr. Edward A. Lifson, Mr. Ratner and Mr. Fieldman.

Said Irving Fieldman further testified as follows in answer to questions put by this deponent:

"Q. Along in May the company executed a paper running to Mr. Aaron Ratner purporting to be an assignment of accounts receivable, did it not?

A. That is right. That was principally arranged between Abner Ratner and his father although the entire—I knew all about it, but anything in connection with Mr. Aaron Ratner was usually taken up with his son.

Q. That is a matter referred to in the minutes of the meeting of the board of directors held on May 23rd?

A. That is right.

28 Q. Was there any discussion at that meeting of directors or between any of you three or four officers at or about that time concerning the matter of this assignment of accounts?

A. There was.

Q. Was there anything said about continuing to collect the accounts?

A. Absolutely.

Q. What?

A. When Mr. Abner Ratner suggested that his father would like to have an assignment of the accounts as I recall it I asked him why, and he explained to me that inasmuch as Mr. Aaron Ratner, his father, had money with us from time to time and we had not reduced those obligations it was becoming more or less a permanent capital and that since his father had a certain sum of money and had no business whatsoever he depended upon the interest coming from that money and the safety of the principal in order to be assured of his interest, and the father would rest easier if he had such an assignment and we agreed to give it to him.

Q. What was said about your continuing to collect the receivables?

A. Why, the first question I asked was whether Mr. Ratner would have anything to do or would insist upon getting the money as it came into our hands, and he said, no, that we could receive the collections in the usual way, it did not make any difference to Mr. Ratner, he simply wanted assurance of his principal, that is all, inasmuch as we were using his money practically permanently for quite some time as designated on our books.

Q. You say who said this, "he"?

A. His son.

29 Q. Abner Ratner?

A. Abner Ratner.

Q. Did you have any talk with Mr. Aaron Ratner himself?

A. No, none whatsoever.

Q. About that matter?

A. No, that was all reported to him by his son.

Q. Was there annexed to that assignment any list of your receivables at that time?

A. If I recall, I am not quite certain, it was the custom of his son to give him a list of all accounts receivable, practically monthly, and as I understand it Mr. Aaron Ratner wanted that to know how our accounts changed monthly.

Q. Did you turn over to him any of the sums collected on your accounts receivable at any time before the 5th of September?

A. None whatsover.

Q. 1921?

A. 1921.

Q. And do you know whether the payments* of the accounts of your receivables were sent to the father, Aaron Ratner, from month to month?

A. I cannot say positively because that was entirely a matter between father and son. It was just an incident.

Q. You know simply that they were prepared?

A. I am quite positive that his son was to do that, meet his father's wishes along that line.

Q. You know such statements were prepared.

A. I think they were.

Q. Don't you know whether they were or not?

A. I will not say absolutely positively.

Q. Did not you ever see any?

A. I believe I saw, I am not positive.

30 Q. You continued after the execution of the paper to collect your receivables just as before?

A. Yes, that is right.

Q. And you used the proceeds in your business?

A. Yes.

Q. As you saw fit?

A. Yes.

Q. And Mr. Aaron Ratner never made any objection to that?

A. None whatsoever.

Q. Nor his son?

A. No.

* * * * * * *

Q. Was there anything definitely said at the time this paper was given as to whether you would continue to use the proceeds of the receivables as they came into the business?

*Note: So in Stenographer's Minutes the word should be statements."

A. Mr. Bacon, I cannot recall exactly the conversation but the assignment in itself will tell you exactly what Mr. Aaron Ratner had in mind. If I remember, it was not a question of what was said, it was a question of what was actually put down on paper.

Q. I have a paper which purports to be a copy of that paper. What I am getting at is, was there anything said in addition about that?

A. Oh, there may have been but it is so far past, it seemed so unimportant at the time, that I do not recall.

Q. It would not have been unimportant if you were giving up all of your receivables, would it?

A. It was not important to us because we knew our position was very safe, it was simply a question of Mr. Aaron Ratner's mind being easy as to the principal, a matter of form perhaps entirely so that he would be assured in case anything did happen and as a business man I thought he figured it that way, that his principal would be safe.

31 Q. You say you did not consider you were giving up all your receivables at that time and turning them over to Aaron Ratner?

A. I knew that we were giving him an assignment to cover his principal.

Q. That is not my question, did you contemplate at that time that you were turning over to him all the moneys, that you would turn over to him all the moneys that came in?

A. No, sir, we were to receive the collections in the usual way.

Q. And keep them?

A. And keep them and make disbursements accordingly.

Q. Did either Mr. Ratner make that statement to you?

A. I do not recall it.

Q. Was there anything of that kind discussed at that meeting?

A. The time is so long ago that I would not say with definiteness as to what was said, everything that was contemplated was put down in black and white at the time and the matter gone over carefully.

Mr. Bacon: I ask this paper be marked for identification.

Paper marked receiver's exhibit "2" for identification October 13th, 1921.

Q. I call your attention to this paper which has been marked receiver's exhibit "2" for identification. Were you present on the 26th of September, 1921, at the office of the Hub Carpet Company when that paper was handed to * young Mr. Ratner?

A. I think I was.

32 Q. And is that a copy, do you know whether that is a copy of the paper that was executed pursuant to the resolution of May 23d?

A. I could not tell you. I have not read it over nor do I remember the exact contents of the original.

*The words "me by" have been omitted by the stenographer in the minutes.

Q. Do you remember Mr. Ratner giving that to me?

A. I think I overheard a conversation between you and Mr. Ratner.

Q. I call your attention to the paragraph at the foot of the second page of that document. Did Mr. Ratner senior ever make any demand in accordance with that provision before the 15th of September?

A. Before the 15th, I do not think so. I am not saying absolutely positive because there is nothing in my mind that would make September 15th stand out clearly so that I can say positively yes or no.

Q. I call your attention to this account, this is your ledger, is it not?

A. Yes, and I can recognize it and tell you all agout it.

Q. There is an account here headed "Aaron Ratner security for notes"?

A. Yes.

Q. The first item on that is September 19th, 1921 credit by check folio 31 $1,364.98?

A. Yes, that is right.

Q. And that is followed by numerous items each day up to the 26th of September?

A. That is correct.

Q. Were those sums all paid over to Mr. Ratner?

A. They were.

Q. That is Mr. Ratner senior?

A. Mr. Ratner senior.

Q. How were they, in the form of checks?

A. In the form of the original checks as received from the
33 various debtors of our company.

Q. Does that first item of September 19th enable you to say whether or not any demand had been made by Mr. Aaron Ratner?

A. Very clearly. I can tell you the circumstances surrounding it.

Q. All right, if you will?

A. I do not know what date September 19th was but if it was a Saturday I can tell you.

Q. September 19th was Monday?

A. It was on a Monday, before that Saturday, the 17th of September, I can recall now, I can tell you positive it was the 17th of September Mr. Aaron Ratner was in our office, and I know that Abner Ratner had a conversation with him and I afterwards learned in that conversation *be* expressed——

Q. You say you learned, from whom?

A. From Abner Ratner, he expressed himself that our company most unfortunately was being interviewed I might say by our various creditors in connection with some money and particularly one firm, Cook's Linoleum Company, that was past due, and it was along that time that there were various creditors' meetings, if I recall, also a meeting with Mr. Stamler, which in the eyes of Abner Ratner designated the fact that we were in financial difficulties and he so

told his father and immediately upon that interview his father came to us, Abner Ratner and myself and others, that in conformity with his assignment which he held he would like us to turn over from that time all moneys that came into the Hub Carpet Company office.

34 Q. That was on the 17th?

A. That was on the 17th, and that was Saturday, and I believe our deposit had already been sent to Philadelphia, we banked all in the Central Trust & Savings Company and we could not turn that money in that day so we promised him that beginning with Monday's collections we would turn over such collections as came in, that were in connection with the accounts receivable of course.

Q. Did you have any talk with Mr. Aaron Ratner yourself on that day?

A. No, I did not, it was between father and son.

Q. The son reported this to you?

A. Well, but I knew of the demand personally by Mr. Aaron Ratner.

Q. That is what I am asking you, did he make that demand?

A. Yes, in front of his son and myself.

Q. Did he make this statement to you, you have just given us?

A. Yes, to me and Mr. Abner Ratner sitting opposite my desk."

Said Abner Ratner further testified as to the instrument Exhibit I of the affidavit of said Aaron Ratner, and the time of its execution, as follows:

Q. There was then a considerable note due at that time already?

A. Yes.

Q. There was not a new advance of $30,000 at that time?

A. Well, yes, there was, in this way, that we paid up, I am not sure I am correct, but if I remember rightly we paid off what we owed him, that is, on that day; the day that was made, or the following day, and made out a new note.

35 Q. But that new note represented practically the old indebtedness and some more?

A. No, it did not. My figures may be wrong. I think in May we owed my father $15,000, if I remember rightly. When he came in a day or two before it was due I asked him if he would renew it, so he asked me whether we wanted it, what we intended to do with his loans, whether we intended to use them permanently or not. I told him that if possible we could use them more or less permanently, and he said that in view of the market conditions at that time he would be willing to let us have the use of his money if we would secure him by the accounts, and we worked out the best way to secure him without affecting us personally, that is, by not having him collect accounts or anything of that sort, it would be by means of that assignment; so I think we worked it out that way and when his loan became due, which was a day or two later than the day of this assignment, why, we paid that by giving him a new note for the amount and the difference up to $30,000 he was to let us have when we needed it.

Q. And did you afterwards get from him the balance of the $30,000?

A. Yes.

Q. And that was along during June, July and August?

A. Sometime along there.

Q. Does that appear in the ledger anywhere, those further advances?

A. Why, I do not see it on his account. You see for all loans he made us we gave him notes and all the records of our notes payable were kept by Mr. Fieldman.

36 Q. You did not give him the $30,000 note right there and then?

A. No, I think there were two notes, one note in May and one later.

Q. At the time that paper was executed, or before that paper was executed, did you have some discussion among the directors at this meeting about that transaction?

A. Yes, I called their attention to the fact we had——

Q. Who do you mean by "their"?

A. Mr. Fieldman, primarily, and I think I mentioned it to Mr. Lifson.

Q. That is Edward Lifson?

A. Yes, after we had borrowed money off and on from my father and within the past year it had been renewed pretty regularly and I told them I thought if we were going to use it more or less as a permanent loan it would only be right to secure my father in any way possible, and since he wanted that security before he would let us continue renewing those obligations we decided to give him this assignment.

Q. Was anything said about the subject of what should be done at the time with collections as they came in?

A. With our collections, you mean?

Q. Yes?

A. We mentioned it but we told him that we would not under any conditions have him make our collections for us, do you see, and one of the stipulations was that we were to collect them and if at any time should he feel that our financial condition was not absolutely safe he could immediately demand that he become the collector.

37 Q. What was to be done with the sums that you collected, was anything said about that?

A. Nothing at all.

Q. Were you to turn them over to him or use them?

A. No, we were to go on and use them. In other words the security to be turned over to him when he demanded it. In the meantime he held security, he held those accounts, that is, they had been assigned to him.

Q. At the time that paper was executed was any list of the receivables made up for him?

A. Yes.

Q. Was it attached to the paper?

A. It was given to him with the paper, I do not know whether it was attached to it.

Q. Were subsequent statements of receivables given him?

A. Yes, every month.

Q. Were those detailed statements, giving the names of the debtors?

A. The names of the debtors, the amount and the city.

Q. And that was done practically the first every month?

A. No, I think it was done around the 20th, the date of this. You see we gave him the first statement on the 23rd of May and the 23rd of every month thereafter.

Q. Just a month apart. So that there would have been one on the 23rd of June and one on or about the 23rd of July?

A. They may have varied a day or two. In other words he wanted to be sure that the amount of our accounts receivable covered the amount, of our accounts receivable covered the amount, more than covered the amount of his loan.

38 Q. And you did not at any time after the execution of this paper up to after the 15th of September make him any payments did you?

A. Not up to, no.

Q. What happened to the interest on his notes?

A. We paid that.

Q. You paid the interest?

A. Yes.

Q. But you did not in that time up until the 19th of September?

A. I think that is the day, I know it was the week preceding the time Mr. Benedict took possession.

Q. He came in Monday, the 26th?

A. Then it was the 19th.

Q. And up to that time all the sums that you received on receivables had gone right into the general fund?

A. Yes.

Q. And had been used by the Hub Carpet Company?

A. Yes.

Q. And did Mr. Aaron Ratner make any objection to that at any time?

A. No.

Q. And these statements sent to him from month to month disclosed that amounts had been collected and new accounts incurred?

A. Well, naturally there were some accounts would appear on one month's statement that had not been on the preceding, and so forth.

Q. And other accounts that appeared on the preceding statement that had been paid off?

A. Yes.

Q. Who had the talks with your father on behalf of the Company?

A. I did.

Q. Did you explain to him back there in May anything about this arrangement about the maturing accounts?

A. No, nothing definitely was said about that. In fact, you
39 see, Mr. Bacon, this was not a question where we had gone to a stranger to borrow money and where everything would be definitely put down the way it would be if we actually sold our account to a regular house who made a business of that. He simply wanted security if we wanted to use his money more or less permanently and although we did not go into the legal aspects of it we felt sure that this paper would cover him and would not affect us in any way detrimentally.

Q. You had some talk with him at that time about your continuing to collect the accounts?

A. No, nothing definite was mentioned except the understanding was that we were to go on the same way and if at any time he felt shaky about our financial responsibility he could immediately demand that we pay.

Q. In the meantime you were to collect them and use them?

A. Nothing definite said but that was the understanding.

Q. That was the understanding?

A. Yes.

Q. And he so stated to Mr. Benedict and myself on the 26th of September in your presence, didn't he?

A. I do not remember, he may have.

Q. Did not he make that statement, and you say, "Yes, that was the clear understanding"?

A. I do not remember whether those were my words but I do know that the understanding was that we were to go ahead with the collections.

Q. And the use of the money?

A. Naturally.

* * * * * * *

40 Q. All those payments that are represented by that entry you simply transferred the checks as they came in?

A. Yes, checks and notes.

Q. You did not deposit the checks to your own account and give your check?

A. No, they were simply endorsed over.

Q. Were there any notes among them?

A. Yes, all collections were turned over to him."

Said Edward A. Lifson was also examined by deponent with regard to the instrument, Exhibit I of the affidavit of said Aaron Ratner, and testified as follows:

"Q. What is your recollection about this transaction with Mr. Aaron Ratner in May?

A. The only thing I know about it is that I knew Mr. Ratner was negotiating with his father to secure us a loan but I knew nothing of the assignment until it was shown to me for my signature to put on as witness. At that time I read it through and witnessed the signature.

Q. You were at the meeting of directors when it was discussed, weren't you?

A. Well, of course the discussion, I knew about it, naturally I took the minutes but I knew about Mr. Ratner was negotiating for a loan.

Q. Was there any discussion there about whether you should continue to collect your receivables and use them until called for by him?

A. No.

Q. You do not recall any?

A. I do not recall any.

41 Q. However, you did continue to take the receivables as they came in in spite of the assignment?

A. All moneys were taken in in the usual way as if there was no assignment.

Q. And used right in the business of the Company?

A. Used in the business of the Company.

Q. And you understood that that was proper for you to do?

A. What?

Q. That that was the understanding with Mr. Ratner, Sr., that you should do that?

A. That we should collect the funds?

Q. Yes?

A. Yes.

Q. And use them right in your business just as above?

A. Yes.

Q. Until he called for them?

A. Yes.

Q. And he did not call upon you until the 17th of September?

A. Not that I know of.

Q. On the minutes of the meeting of January 3rd, 1921, appear three items of claims charged, one in your favor, one in favor of Mr. Abner Ratner and one in favor of Mr. Fieldman respectively $5,420, for Mr. Fieldman, $3,700 for Mr. Ratner and $5,200 to you except that in the case of Mr. Fieldman it is stated that it was a bill for disbursements and likewise in the case of Mr. Ratner, but in your case it is stated to have been a bill for additional services. What was the nature of that claim of yours for $5,200?

A. That was for moneys personally expended by me since the organization of the company.

Q. Of the old Company?

A. Of the old Company, for additional travelling expenses, entertaining expenses of buyers and so forth, which had never been drawn by me from the Company.

42 Q. And none of these three items of liabilities appear in your balance sheet of December 31st?

A. I could not say. I have no recollection of the figures.

Q. This is a resolution of January 3rd, 1921?

A. Yes.

Q. How could they appear in your books of December 31st, 1920?

A. I say I do not remember, I cannot remember the balance sheet in detail, but the supposition is that they did not appear.

Q. Then as I understand you you think that this statement in

your case that it was for additional services is a mistake. The others read disbursements, yours read for services?

A. I do not know. As far as the wording is concerned, why, the charge would be the same in each case, it was not exactly additional services, it was disbursements, plus additional services.

Q. There was a charge for services in this?

A. A charge for additional services.

Q. Is that true in each case?

A. Yes, I should say yes.

Q. And the $3,000 that you took from the Central Trust & Savings you took that knowing that the creditors were discussing the question of Receivership?

A. Yes.

Q. And simply handed $1,000 to Mr. Ratner and $1,000 to Mr. Fieldman and took $1,000 yourself?

A. Yes.

Q. And credited that up against the accounts that you each had?

A. Against our accounts."

43 Deponent further says that he has examined said claimant Aaron Ratner, pursuant to said order, and hereto annexed marked Exhibit E is a copy of the testimony of said Aaron Ratner so given on the 14th day of October, 1921, which is hereby made a part of this affidavit.

Deponent further says that all the foregoing mentioned testimony is copied from the stenographer's minutes.

Deponent further says that Exhibit No. 2 for identification on the examination of said witness under Section 21-A is the copy of the instrument Exhibit I of said Aaron Ratner's affidavit delivered to deponent on the 26th of September, 1921, but varies therefrom in that the word "hereunto" is "hereto" in the said Exhibit 2 for identification, and that in said Exhibit 2 for identification the signatures "Abner Ratner" and "Edward A. Lifson" do not appear.

SELDON BACON.

Subscribed and sworn to before me this 24th day of October, 1921.

[SEAL.] O. V. W. HAWKINS,

Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co. No. 4.

N. Y. Co. Register's No. 2002.

44 EXHIBIT E.

United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of HUB CARPET COMPANY, Bankrupt.

Before Harold P. Coffin, Esq., Referee in Bankruptcy, 217 Broadway.

New York, October 14, 1921—10 a. m.

Hearing under Section 21-*a*.

Proceeded pursuant to adjournment.

Appearance-:

Mr. Selden Bacon,
Attorney for receiver.
Mr. Wallace Benedict,
The receiver.
Mr. Louis S. Posner,
Attorney for Aaron Ratner.

45 AARON RATNER, called as a witness on behalf of the receiver and being duly sworn testified as follows:

Direct examination.

By Mr. Bacon:

Q. Mr. Ratner, you reside where?
A. 1804 Arthur Avenue.
Q. In the Bronx?
A. Bronx, yes.
Q. And you are the father of Abner Ratner who is one of the officers of the Hub Carpet Company?
A. Yes.
Q. Vice-president, I think he is?
A. Yes.
Q. And are you familiar with the fact that there have been two or three corporations of the same name?
A. I am not. I only know of one Hub Carpet Company.
Q. They did business in Philadelphia for a while, did they not?
A. The same name.
Q. The same name but was not that a different company? Was not that a Pennsylvania corporation?
A. I do not know the details of it. They are always called the Hub Carpet Company.

Q. Had you prior to January 1st, 1921 lent the Hub Carpet Company any money?

A. Yes.

Q. How much?

A. $20,000. That was the last time. Four years ago I also loaned them money but there was a period of four years I did not give them any money.

Q. But before the 1st of January you had loaned them $20,000?

A. Yes, in December 24th, 1920.

Q. Was that paid up?

A. Yes, that was paid up.

Q. When?

A. It was a note for three months that was due December 24th. On December 24th they gave me $2,500 on account and the interest and they renewed it again for three months.

46 Q. That is renewed the balance?

A. The balance, yes.

Q. That would bring it to March 24th?

A. To March 24th, 1921. On March 24th they paid me off the entire amount and they borrowed again $15,000.

Q. On March 24th?

A. On March 24th.

Q. For how long?

A. For two months.

Q. I call your attention to this paper marked Exhibit "2" for identification, that is, is it not, an exact copy of the instrument which you have this morning produced with the exception that the instrument produced by you bears the seal of the Hub Carpet Company and the signature of Abner Ratner as vice-president and of Edward A. Lifson secretary?

A. I understand that this is a carbon copy of the original paper.

Q. You have just heard this paper read?

A. Yes.

Q. And you know it is correct, with those exceptions?

A. Yes.

Q. When did you get this paper?

A. I got this paper the 23d of May, that was before the note was renewed, the 24th it was due, and at the time it was renewed this paper was given to me.

Q. Did you have any conversation with any of the officers of the Hub Carpet Company prior to the giving of this paper?

A. Yes.

Q. With whom?

A. Well, particularly I was talking with my son.

Q. Did you talk to any of the others?

A. Well, occasionally passing just a few words.

Q. I mean about that paper?

A. Yes, with Mr. Fieldman, the treasurer.

Q. What talk did you have with Mr. Fieldman and when and where?

A. Well, I could not tell you the exact date but it was a
47 week before the 24th, during that week when they told me, they called me up and they told me they want again to renew the note.

Q. You mean this was a telephone talk?

A. What, no; they called me up on the telephone and they asked me.

Q. I say it was a telephone talk, a talk over the telephone?

A. I am trying to explain, not over the telephone, they asked me generally when I will be around there to come in, so when I came in my son took me aside and started to tell me, of course I made arrangements to use up the money and they told me they wanted to lend it again, and I told them I did not like the idea, I did not mind to give it to them for so long and I did not like it and they started to tell me that a little they are tied up in collections and that they expect towards the end of a couple of months later they will be free, more free, and they want it for a couple of months more. I told them if that is the case I want to have security, particularly I did not like the idea.

Q. All I want is what was said. With whom was this talk mainly?

A. With my son.

Q. Did you have any further talk with Mr. Fieldman at that time?

A. Yes, not about the same thing but not much, the main talk was with my son.

Q. What further was said? You said you wanted some security?

A. Yes, I wanted some security. Well, they told me they wanted, they could not, it would be kind of compromising themselves to be giving away the checks, somebody should collect it and they could not do it so they said that they could do it providing they made ar-
48 rangements that they should be able to keep on collecting the checks and everything until I will find it advisable that I should call it in but if ever I did not find it advisable in any way or manner so that nobody should know about it and they should keep on collecting the checks.

Q. And using the money?

A. And using the money, certainly.

Q. Then you talked with them further about what the terms of the arrangements should be?

A. I told them all I want, that is what we had agreed, and accordingly this paper was drawn up.

Q. Who drew it up?

By Mr. Posner:

Q. You say accordingly?

A. According to our understanding.

Q. You mean this paper was to be your talk and understanding?

A. Yes.

By Mr. Bacon:

Q. Do you know who drew up this paper?

A. Well, I had some similar papers in my office, copies of con-

tracts, which is usually done in the same way, and I brought it to them and I showed them something, that is what I want.

Q. Do you know what papers those were that you showed them?

A. Oh, I have different papers.

Q. I say do you know which ones they were? Can you identify them?

A. What?

Q. Which papers you showed them?

A. Well, I remember I had some blanks from Wormer & Company and the State Bank, they were just some printed blanks and I showed them and I told them something like it and they simply extracted something from these papers and they made accordingly.

49 Q. Do you know who drew the paper up?

A. No, simply the boys gave me that.

Q. And then they brought you this paper?

A. Yes.

Q. What was done about your existing debt, the note?

A. On the next day they changed the note.

Q. They gave you a new note in the place of the old one?

A. Yes.

Q. How large was the new note?

A. $16,000, the same amount. They paid me off the interest and they gave me a new note.

Q. That is on the 24th of May?

A. The 24th of May.

By Mr. Posner:

Q. They paid you interest on the old note?

A. For the old note. I gave them away the old note and they gave me a new note.

Q. You mean gave them back?

A. Gave them back.

By Mr. Bacon:

Q. After that did you make any further loans to the company?

A. That same note became, on July 1st I gave them $15,000 again.

Q. Additional?

A. Additional, yes, and then when this note became due on July 24th it was renewed again, the first note.

Q. And for how long?

A. Two months.

Q. That came due again on the 24th of September?

A. September, yes.

Q. At the time this paper was executed did they hand you a list of the accounts at the time they made this paper?

50 A. Yes, it was understood that they should give me every month a list of the accounts.

Q. Did they hand that list of the accounts to you at the same time

they handed you that paper (Exhibit "2" for identification) or a day or two later?

A. I really could not remember exactly whether it was exactly ready or not because it was just a couple of days it was spoken about and made a paper and I could not say exactly whether it was this day or it was a day later.

Q. They did not hand you the two papers together?

A. I am telling you I do not remember. It is a thing I did not take because I did not use the accounts at that time.

Q. Did they give you each month a list of the accounts?

A. Yes.

Q. It is a pretty long list, isn't it?

A. Yes.

Q. Each time?

A. Each time, yes.

Q. Covers ten to fifteen pages?

A. Well, I do not know exactly how many pages it covers but I know it was always something like $100,000 or $120,000, something like that. The last one was about $90,000.

By Mr. Posner:

Q. What do you mean the last one?

A. The last account I got was about $90,000 was the amount, I never counted the pages.

By Mr. Bacon:

Q. I have here a list which was made up on September 20th, eleven pages long, single space. It was quite a long document each time?

A. Yes, it was.

51 Q. Have you got the different statements that they rendered you of the accounts?

A. Only the last one.

Q. What did you do with the earlier ones?

A. I simply destroyed it.

Q. You say the last one was about $90,000?

A. Yes, I think so.

Q. Have you that one?

A. Yes.

Q. And have you it here?

A. Yes, the list.

Q. May I see it?

Mr. Posner: Certainly.

(Counsel produces paper.)

Q. Did you examine these different lists as you got them?

A. I just looked at the balance, I did not care for it because I only wanted it should be two or three times as much as my debt.

Q. You knew they were collecting and paying off and getting new receivables all the time?

A. That was according to the agreement, yes.

Q. On this list of yours I will ask you have you found any of the following receivables, they are arranged practically in alphabetical order. Do you find an account listed there of L. Berman, somewhere between $1,000 and $1,200? Look and see if you find it there?

A. I could not answer you that because it would be for me very hard to follow up the list. I know the last time when I checked up the list I had to call in my boy to check with me. They have it in such a funny way, it is not strictly alphabetically. It is some kind of a mixed way, kind of a mixed system, it is very hard.

Q. There are a number of items that do not appear there. There were certain advances to sales men, I want to see if they are
52 on that list?

A. They are accounts for merchandise only. I wanted responsible people.

Q. Did not they ever report to you the names and amounts of their own salesmen?

A. No, I knew no particulars of their business.

Q. This statement that you have of September 23rd what is the total amount of receivables shown on that?

A. I think it is about $90,000.

Q. I want the exact figures?

Mr. Posner: $89,505.44.

Q. Did you have some talk with some member of the Hub Carpet Company with regard to the kind of list they were to give you?

A. Yes.

Q. When was that?

A. In the beginning.

Q. That is last May?

A. Yes, in May.

Q. And with whom was that talk?

A. With my son.

Q. And where?

A. Well, I spoke with him in so many places it may have been at a restaurant at lunch, it may have been in the store, I cannot say exactly.

Q. What was said about this list, what did he say and what did you say?

Mr. Posner: Mr. Referee, I object, there have been a great many questions asked without objection as to conversations preceding the making of a document in May of this year, over four months preceding the bankruptcy. I feel the time has come when I should object on the ground that all these conversations were merged in the written document and broad as the rules of evidence are on
53 hearings of this kind I think we have reached the point where there should be a ruling on the objection to taking further testimony on this line.

The Referee: There is no issue joined and I cannot very well know what the examining counsel may have in his mind. I do not see that I can limit the examination.

A. In the beginning I said I wanted to have a list so that I could have the accounts that I should be secured with my money, that is all. I cannot say I remember every word, we kept on talking for core than a week, for more than a week's time we kept on talking. We used to go to lunch together and we kept on talking, they did not like the idea but I did not feel secured.

Q. Was there anything said about whether the list should be itemized or not, giving the separate accounts?

A. I do not remember that but what I do know personally the way I believe is all I wanted was there should be about two or three times as much the amount as mine, that is all I know, I do not remember if there was anything particularly said. I know that whatever was said they made out a paper and I was satisfied with it, that is all.

Q. They sent you those lists each month?

A. Yes.

Q. Were those lists made out like the one you have produced here?

A. Yes.

Q. With individual names?

A. Yes.

Q. Addresses and the amounts of individual claims?

A. Yes.

Q. Did these separate lists month after month show the amounts had been collected on various claims and new claims had
54 arisen?

A. I never examined the list thoroughly in that way. I understood during the month, I could not imagine in any other way they must have collected and they must have bought some merchandise and the amounts changed but I never examined it thoroughly because I did not care for it.

Q. The amounts did change in these different reports?

A. Yes.

Q. Did you collect any or receive from them any proceeds of collection of any of these claims prior to the 19th of September, 1921?

A. No.

Q. Not a cent?

A. No.

Q. And you knew all through that time that they were collecting and using the moneys in the business?

A. Of course I knew because that was understood in the agreement.

Q. Since the 17th of September, 1921, which was Saturday, I think you went to them on that day, didn't you, and told them that you wanted the accounts turned over to you for collection?

A. Yes.

Q. And had they made a deposit in the bank that day?

A. I do not know, I could not tell you.

Q. Did they turn over to you any moneys collected that day?

A. No.

Q. On the 19th you did?

A. They started to collect on the 19th but I did not get it until the 20th, the next day.

Q. What did they send you, their own check for the proceeds of what they had collected?
A. No, they turned me over the checks.
Q. What did you do with them?
A. I deposited them.
55 Q. To your own credit?
A. Yes, in my bank.
Q. And were there some notes as well as checks?
A. Yes.
Q. Where are the notes?
A. I gave them to the bank for collection.
Q. What bank?
A. The Mechanics & Metals Bank, 103d Street and 1st Avenue.
Q. That is their branch uptown?
A. Yes.
Q. And is that your regular bank?
A. Yes.
Q. Do you know what the amount of checks collected by you from the 17th of September on amount to?
A. Yes.

Mr. Posner: I will ask my client to make up a statement and give you showing what collections he has made and he will present it.
Witness: Yes, there was one check came back, the people stopped payment, and I have a complete list of the checks, of the trade acceptances, of the notes, certainly I have a complete list.

Q. What day was this last statement of accounts which you have sent you?
A. The 23d.

By Mr. Posner:

Q. With each monthly account that you received did you receive a letter from the Hub Carpet Company?
A. Yes.
Q. Substantially like the letter attached to the statement of September 23d?
A. Yes.

Mr. Bacon: That I object to. I would like to see the letters themselves.

56 By Mr. Bacon:

Q. You have produced here the list dated September 23d which is a carbon copy of a list of the accounts and a letter pinned to it or clipped to it on the stationery of the Hub Carpet Company reading as follows:

"Sept. 23, 1921.

Mr. Aaron Ratner, 1804 Arthur Ave., New York City, N. Y.

DEAR FATHER:

Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23d, 1921.

Yours,

THE HUB CARPET CO., INC.
ABNER RATNER,
Vice-President."

that is correct, isn't it?

A. Yes.

Q. You received each month a list similar to this one?

A. Yes.

Q. And some letter more or less of that character?

A. Yes.

Q. Have you those letters?

A. No.

Q. Those have been destroyed?

A. I simply used to throw them out after.

By Mr. Posner:

Q. As you got each new list?

A. Yes.

By Mr. Bacon:

Q. The amount of collections you received during the
57 week of September 19th to September 26th was approximately $13,000, was it not?

A. I can tell you more correct. I happen to have here my bank book and I can tell you how much I deposited. I deposit one time $5,566.67, I deposit a second time $4,869.03, and then $1,065.30, and $106 50. Out of this a check came back for $159.46.

Q. How about notes?

A. I will give you the notes. It was $133.71, $1,000, $200.00, $200.00, $492.08, $157.92, $80.16. Some of them are trade acceptances and some of them are notes which I cannot use there themselves. This is my bank book but when I bring you the list then I will specify.

Q. Mr. Ratner, you produce here in the first place your check No. 639 on the Mechanics & Metals National Bank, Harlem branch, September 24th, 1920, to the Hub Carpet Company Inc., for $20,000 stamped "paid" and "paid through the New York Clearing House by the Seaboard National Bank September 27th, 1920?"

A. Yes.

Q. In the second place your check No. 718 March 24th, 1921, on the same bank to the order of the Hub Carpet Co., for $15,000 stamped "paid" March 25th 1921" and endorsed "received payment

through the New York Clearing House by the Irving National Bank."

In the third place your check No. 748 of July 1st, 1921, on the same Mechanics & Metals Bank for $15,000 stamped "paid" July 5th, 1921" and stamped "Received payment through the New York Clearing House by the Irving National Bank July 5th, 1921."

In the next place, a note for $15,000 made by the Hub Carpet Company or purporting to be made by the Hub Carpet Company to your own order dated July 1st, 1921, for $15,000, due Oc-
58 tober 1st, 1921, payable at 23 West 24th Street, New York, N. Y.

And a further note dated July 24th, 1921, by Hub Carpet Company signed Irving Fieldman, treasurer, promising to pay $15,000 on September 24th, 1921, to your order at 23 West 24th Street.

Lastly a check No. 1580 of S. Tekulsky to the order of the Hub Carpet Company for $159.46 on the Manufacturers Trust Company, Brooklyn, N. Y., endorsed "Pay to the order of Aaron Ratner, the Hub Carpet Company, Abner Ratner vice pres." endorsed in turn "Aaron Ratner" and stamped "Payment stopped."

That is correct?

A. Yes.

Q. And the signatures on the three checks on the Mechanics & Metals National Bank are your signatures?

A. Yes.

Q. And the signatures on the note of July 1st is your son's?

A. Yes.

Q. And the signature on the note of July 24th is Mr. Feldman's?

A. Yes.

Q. And the other one of course you know nothing about?

A. No.

Q. Except this is the check which you received about the 24th of September, and deposited for collection which was returned unpaid as you told us?

A. Yes.

——— ———.

Subscribed to before me this — day of ———, 1921.

——— ———,

Referee in Bankruptcy.

(Endorsed:) Filed Nov. 14, 1921, 12 M. U. S. District Court, S. D. of N. Y.

59 *Replying Affidavit of Aaron Ratner Read in Support of Motion.*

United States District Court, Southern District of New York.

In the Matter of THE HUB CARPET COMPANY, Alleged Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Aaron Ratner being duly sworn, deposes and says: Voluminous affidavits made by Wallace Benedict and Seldon Bacon, with lengthy exhibits thereto attached, have been submitted upon the motion made by me herein; I have read these documents, and except for a conversation recited to have been held with me and except for a transcript of my testimony taken under Section 21-*a* in behalf of the Receiver, every matter and thing referred to in these documents is utterly foreign to me, outside of my knowledge, unconnected with me, and as I am informed by my attorney and verily believe, utterly irrelevant to the issues before this court.

I am informed by my attorney that upon the hearing of this motion on the 21st instant, which has since been adjourned for argument until the 31st instant, counsel for the Receiver stated to the court that no dispute is raised as to the facts, but that the question before it is one altogether of law, namely, whether or not the agreement is valid and whether I am entitled to the relief prayed
60 for despite the fact that these moneys were advanced by me at or about the time of and in connection with the execution and delivery to me by the Hub Carpet Company on May 23rd, 1921, of the agreement Exhibit 1. I am advised therefore, that in view of this understanding, it is not necessary for me in detail to review the affidavits submitted in behalf of the Receiver, but that simply for the purposes of record, it is proper that this reply affidavit be made.

I knew at the time the agreement in question, and prior thereto, that my son and others were interested in the Hub Carpet Company; indeed it was because my son was interested in it that I undertook to lend the company any money whatever. At the same time I felt that I should be secured, and it was for that reason, as shown in my testimony, that I demanded the security of assigned accounts.

On May 24th, 1921, pursuant to the agreement, and my understanding between the parties, a detailed statement giving the names of all the accounts upon the books of the Hub Carpet Company was handed to me; on that day there was due to me the sum of Fifteen thousand dollars ($15,000) from the Hub Carpet Company, and, therefore, relying upon the agreement I returned to the company its note representing its obligation and took its new note dated May 24th, 1921, payable July 24th, 1921. On or about June 23rd or 24th, 1921, I received from the said company the list of its accounts receivable set forth in detail, giving the names of customers and the

amounts due from them. On July 1st, still relying upon the agreement in question, I lent to the Hub Carpet Company, at its
61 request, the additional sum of Fifteen thousand dollars ($15,000) making the total of Thirty thousand dollars ($30,000) referred to in that agreement. At that time the company delivered to me its note for Fifteen thousand dollars ($15,000) payable October 1st, 1921. On July 24th I received again a list showing in detail the accounts receivable upon the books of the company, at which time also I surrendered up its note July 24th, and dated May 24th, and received in its place a note for Fifteen thousand dollars ($15,000) due September 24th, 1921; so that at the time of the commencement of this proceeding I had and now have in my possession the last two mentioned notes, each for Fifteen thousand dollars ($15,000) one dated July 1st, 1921, payable October 1st, 1921, and the second dated July 24th, 1921, payable September 24th, 1921. In August and again in September I received from the Hub Carpet Company like lists of accounts receivable, with each of these lists, beginning at the outset in May, 1921, I received a letter of transmittal substantially in the form of the letter of September 23rd shown in the testimony, which letter reads as follows:

"Sept. 23, 1921.

Mr. Aaron Ratner, 1804 Arthur Ave., New York City, N. Y.

DEAR FATHER:

Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23rd 1921.

Yours,

THE HUB CARPET CO., INC.,
ABNER RATNER,
Vice President."

62 The list of receivables was substantially similar in general form to the receivables list of September 24th, which was marked in evidence upon my examination under 21-*a* and which is respectfully made part of this affidavit.

On September 17th, 1921, I learned that certain of the creditors of the company had become dissatisfied and were demanding payment of past due accounts. I did not know then and certainly did not believe in the least, that the company was insolvent, feeling simply that like all businesses in times of depression it was having difficulty because of the more or less unreasonable pressure of one creditor or another; I know from my own experience and from my own knowledge of many years in business in the City of New York, that it is a very common occurrence for firms of soundest financial respo-sibility to undergo difficult periods when, because of slow collections or slow turn-over, they are unable to meet in cash the pressing demands of creditors which could be amply met if reasonable consideration were shown by the creditors. This is precisely the situation in which I believed the Hub Carpet Company found itself at

that time. Nevertheless, I felt that I was entitled to and I demanded the protection which by agreement had been given to me, and in reliance upon which I had advanced the $30,000. I so expressed my self to the offices of the company on September 17, 1921, and it was agreed that I should receive the checks that would thereafter come in in connection with its accounts receivable. Thereafter, and until the appointment of the Receiver, I did receive the checks, trade acceptances and notes which came in from customers who appeared upon the books of the Hub Carpet Company as debtors,
63 and whose names appeared on the lists delivered to me, these obligations being turned over to me in precisely the form in which they were received, and, so far as I know, constituted all the obligations received by the company following my demand on September 17th.

As stated by me in my original affidavit, the total amount which I have thus far collected is $11,581.75, through the use of the checks and documents turned over to me as aforesaid, the balance remaining due now being $18,418.25, with interest.

With the affairs of the Hub Carpet Company and the conduct of its business I had absolutely nothing to do at any time, and had absolutely no knowledge of them. I know nothing of the minutes of its various meetings, except that I was informed that the corporation had, on May 23rd, 1921, adopted resolutions properly authorizing the execution of the agreement with me. The receiver and his counsel do not claim that I knew, and I assert that I did not know anything whatever concerning a meeting of January 3rd, 1921, at which the directors of the company adopted resolutions fixing the salaries of the officers, nor do I know whether such salaries were ever paid; I know nothing about any mortgage executed on September 15th, 1921, to one Husbands, nor of any payments made in connection therewith; I know nothing of any notes due to the Bank of Manhattan Company or any other bank; I know nothing of the personal liability upon these notes on the part of any of the directors; I never knew who the creditors were who were pressing for payment nor how far in arrears the Hub Carpet Company was, if at all, in connection with their accounts. I took no part in any way, nor was I present or represented at the examination of the officers of the corpo-
64 ration when they gave the testimony which the receiver quotes at length in this proceeding.

So far as I read that testimony however, it quite correctly sets out the facts concerning the making of my agreement of May 23rd. A great many things were discussed before that agreement was executed, but everything that was discussed and the final conclusions reached were set forth in that agreement; in other words, to quote the language of one of the witnesses as set forth at folios 18 and 19 of the testimony attached to Mr. Bacon's affidavit

"It was not a question of what was said, it is a question of what was actually put down on paper * * * Everything that was contemplated was put down in black and white at the time, and the matter gone over carefully."

In view of the fact that certain items are set forth in Exhibit D as having been delivered to me on account of the money due, I submit herewith, marked Exhibit 2, a detailed statement of all the sums which I have collected as herein above mentioned.

AARON RATNER.

Sworn to before me this 28th day of October, 1921.

HELEN LEVIN,
Notary Public, Kings County.

Kings County Clerk's No. 162.
Kings Co. Register's No. 2178.
Certificate filed in New York County.
Clerk's No. 462; Register's No. 2367.
Commission expires March 30th, 1922.

65 EXHIBIT 2.

Representing Checks and Payments Received by Aaron Ratner.

Checks:

W. C. Green Furn. Co.	26.02
Boston Store Co.	120.96
F. L. Coran & Co.	156.48
Gan & Gong	25.78
Shadock & Namendin	35.00
E. Menen	27.28
Weil & Co.	12.96
M. C. Bricker	83.82
A. Crolick & Co.	92.16
Playerton Co.	112.42
I. Klinghoffer	65.48
H. Fisher	375.42
M. Usliner	31.20
A. Feldman	200.00
Sam Herzfeld	948.22
A. Kranick	23.86
Geo. A. Thurin	165.50
M. Rothstein	137.11
M. Blank	32.21
Guarantee Fur Co.	43.39
London Turn	19.28
Marthaum Bros.	1,116.99
Union Furn.	25.38
M. Lehrer	75.00
Rochester Store	104.99
A. Weitzner	72.81
Great N. Y. Furn.	218.71
Serviss passenger	166.69
G. Glick	57.98
J. Checkman	103.57

Magnet Furn.	37.32	
G. G. Seaman	87.75	
66 Miller & Plores	49.16	
M. Strelzer	23.33	
G. Naumin	36.40	
A. Schattenfeld	155.40	
Onandaga Spec. Co.	41.28	
Max Lipitz	67.50	
F. B. Fornwald	182.40	
Tonella & Co.	86.40	
Thomas Furn.	97.92	
J. D. Vanderver	31.20	
Trade acceptances:		
Sam Herzfeld (protested)		1,000.00
Notes:		
M. Capuano (collected)		133.71
W. C. Green		83.50
Dated checks:		
Subitzky		50.
Subitzky		56.50
Checks:		
Nathan Adlorb	22.63	
Milne Home Furn.	245.76	
M. Silverstein	73.68	
Adirondack Furn.	106.56	
R. Isenberg	300.00	
Embie Furn.	340.47	
Long Island Furn.	57.66	
Kneller Furn.	156.06	
Charles Levy	41.56	
Ben. Federman	86.40	
Winegar Furn.	43.92	
67 Loerbenberg Bros.	533.24	
Philip Cohan	32.12	
H. H. Spitler	71.19	
S. Tekulsky (stopped payt.)	159.46	
L. M. Nelson	49.64	
I. Spitz	76.32	
Simon Draper	78.50	
Sharnack & Conelly	46.08	
M. Phillips	276.52	
J. Peltin	67.95	
National Furn.	151.59	
Montgomery Brooks	80.15	
Mastbaum Bros.	300.84	

Jos. Litshin	38.20	
G. Lebowitz	23.33	
D. Hoffman	45.50	
M. Henick	205.22	
I. Goodman	162.02	
Globe Furn. Co.	600.48	
Gelgood Bros.	339.66	
Gerard Caccesse	22.56	
Binghamton Auct.	22.56	
Manhattan Carpet	70.56	
Joseph Cohan	154.52	
Lawrence Furn.	54.18	
Mesnik Bros.	96.00	
Philip Butler	154.06	
J. Graziano	93.60	
Modern Furn.	71.44	
Ranieri Furn.	26.51	
Burden & Co. & John McCormick	49.62	
United Furn.	94.32	
Freeland Koonz	54.00	
Sam Shaivitz	66.24	
68 Weybosset Furn.	21.60	
Elite Store	22.03	
Prince Furn.	36.62	
Notes:		
United Furn. Co.		200.00
" "		200.00
" "		492.08
Trade acceptances:		
Jefferson & Leneck		159.92
Home Furn. Co.		80.16
Dated Checks	106.50	
	$11,607.50	
Plus note Capuano col.	133.71	
	$11,741.21	
Less return check of Tekulsky	159.46	
	$11,581.75	$2,346.37

(Endorsed:) Filed Nov. 14, 1921, 12 M. U. S. District Court, S. D. of N. Y.

69 *Replying Affidavit of Selden Bacon Read in Opposition to Motion.*

United States District Court, Southern District of New York.

In the Matter of HUB CARPET COMPANY, Alleged Bankrupt.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Selden Bacon, being duly sworn, deposes and says, that he is the attorney and counsel for the Receiver herein.

Deponent denies that he stated to this court on the first hearing of this motion that there is no dispute as to the facts in this matter. It was the counsel for Mr. Ratner who stated that there was no dispute as to the facts, and deponent declined to agree with that statement while urging that facts were conceded by Mr. Ratner that rendered the assignment of accounts to him void as fraudulent and the court suggested on the argument that it thought that the question of law arising on the admitted facts should be first passed on by the court before referring the case for any hearing as to any disputed matters.

Deponent further says that the attorney for Mr. Ratner, Mr. Louis S. Posner, was not in court at the time of the argument, which
70 was on October 24, 1921, not October 21st, as stated in the affidavit of Mr. Ratner, and that consequently any information derived by Mr. Ratner from Mr. Posner is only at third hand and no reason is given why the affidavit of the gentleman who was present representing Mr. Posner is not presented.

SELDEN BACON.

Subscribed and sworn to before me this 31st day of October, 1921.

[SEAL.] WM. G. PHILLIPS,
Notary Public.

Kings Co., N. Y., No. 5.
Certificate filed in N. Y. Co., No. 32.
Kings Co. Register's No. 2005.
N. Y. Co. Register's No. 2036.

(Endorsed:) Filed Nov. 14, 1921, 12 M. U. S. District Court, S. D. of N. Y.

71 *Opinion.*

United States District Court, Southern District of New York.

In re HUB CARPET COMPANY; EX PARTE AARON RATNER.

Motion by an Assignee of Accounts, one Aaron Ratner, Against a Receiver in Bankruptcy to Require Him to Pay Over Sums Collected on the Accounts under the Following Circumstances.

On May 23, 1921, the bankrupt company was indebted to one Ratner in the sum of fifteen thousand dollars. Wishing to give him security they executed a contract transferring to him all their accounts outstanding at the time and gave him a full list of them. The contract included not only accounts then existing but any such as should come into existence in the future. At the end of each thirty days the bankrupt gave Ratner a new list specifying each account but comprising all their open accounts at the time. On one such occasion Ratner lent them fifteen thousand dollars more upon the faith of these assignments. Meanwhile the bankrupt continued as before to collect on its accounts freely and to use the proceeds in its business. This was done with the consent and by an agreement between them and Ratner. On September 17, 1921, Ratner becoming con-
72 cerned over the solvency of the bankrupt began collecting on the assigned accounts, and has now taken in some eleven thousand dollars. The petition in bankruptcy was filed more than four months after May 23, 1921, and the receiver has collected upon accounts which were contained in the lists delivered to Ratner before the bankruptcy.

The receiver argues that the reserved right of the bankrupt to collect the assigned accounts and to use the proceeds was inconsistent with the existence of a genuine transfer, a fraud on creditors, and that the security is void.

Louis Posner for the motion.
Selden Bacon opposed.

LEARNED HAND, *D. J.*:

There can be no doubt that if the agreement had been that the bankrupt should always substitute assigned accounts in amount up to the value of those in existence on May 23, 1921, the security would have been valid. Sexton v. Kessler, 225 U. S. 545; Chapman v. Hunt, 254 Fed. R. 768 (C. C. A. 2nd). In Robinson v. Elliott, 22 Wall. 513, a chattel mortgage was before the court which provided that the mortgagor "may sell the same" (the chattels) "and supply their places with other goods and the goods substituted by purchase for those sold shall * * * be subjected to the lien of this mortgage." This was held a fraud, not under the Indiana statutes which were thought to be inapplicable, but at common law. The case very clearly went upon the doctrine of reputed ownership, p. 525, though

the precise deception involved was perhaps not analyzed. The
73 law so established is the same as that at least preferred in Skilton v. Codington, 185 N. Y. 80, 91, though more stringent than the rule in the New York case of Brackett v. Harvey, 91 N. Y. 214. The point, however, is that it was rested upon the doctrine of reputed ownership. The New York law, which recognizes the same rule, has not so definitely declared its basis, Edgell v. Hart, 9 N. Y. 213; Russell v. Winne, 37 N. Y. 591; Potts v. Hart, 99 N. Y. 713; Hangen v. Hachameister, 114 N. Y. 566; Skilton v. Codington, supra. Yet all these cases did involve chattels, as did In re Leslie-Judge Co., 272 Fed. R. 886. That decision went on the law well-established, certainly since Russell v. Winne, supra, that the whole mortgage is void if any chattels be covered over which the mortgagor has the right of disposal, In re Volence, 197 Fed. R. 232, In Re Rodin & Kalisch (D. C., S. D. N. Y., July 20, 1917). As I am in any case bound by the ratio decidendi of the Supreme Court and as under that ruling the cases of Sexton v. Kessler, supra, and Chapman v. Hunt, supra, could not have been decided as they were, except that the property was not chattels, it seems necessarily to follow that the doctrine depends only upon reputed ownership. If it does, I do not see how the absence of a provision that the assigned accounts should be kept at a given amount can make any difference. Being by hypothesis assets which are not capable of apparent ownership, and there being no proof in the case of any actual estoppel in favor of any creditors, the transaction is valid as the parties meant it. So far as such a lien "floats" on the property, it "floats" as little when the security is diminished as when it is kept good. That
74 seems to be a matter merely between the lender and the borrower.

Yet the doctrine as laid down in Sexton v. Kessler, supra, went a little further. It clearly presupposed that in the case of property where there could be no reputed ownership, enough rights might be reserved to the mortgagor to become inconsistent with the existence of a lien. Obviously that depends on how you define the requisites of such a lien, and the question was stated to be one of degree, without attempting to fix the crucial point. It was expressly said that a mere promise would not serve; there must be some identification of the property assigned. I should have no doubt under this case that a mere agreement that the lender should have a lien generally upon all accounts would not be enough, but if they be specifically identified as was done in Sexton v. Kessler, supra; Chapman v. Hunt, supra, and Young v. Upson, 115 Fed. R. 192, it seems to me not to matter whether they are always to be kept at a given figure. The same inconsistency or consistency with the lien exists in either case, and it would be regret-able to establish fanciful dis-inctions in a subject not very clear at best.

Now in the case at bar it is true that the accounts were not formally assigned as in Chapman v. Hunt, supra, but the equivalent was done when on the twenty-fourth of each month a list of specified accounts was transmitted to Ratner. No writing is necessary to the

assignment of a chose in action, Union Trust Co. v. Bulkeley, 150 Fed. R. 510, and the intent in transmitting the lists was clear enough. Thereupon the parties meant that these specific
75 accounts should be collateral to Ratner's advances. All this was done pursuant to an agreement antedating the period within which the Bankruptcy Act will unravel the transaction and, so far as I can see, "there is no local or general law that takes from the transaction the effect it was intended to produce," Sexton v. Kessler, supra, 99.

The petitioner may therefore take an order directing the receiver to account for all sums received by him upon any accounts contained in the lists transmitted to Ratner, and that the bankrupt or its trustee execute a formal assignment of the balance of such accounts up to the extent of his advances.

L. H., *D. J.*

November 14, 1921.

76 *Decree.*

At a Stated Term of the United States District Court for the Southern District of New York Held in and for said Southern District, at the Federal Court House, in the City of New York, on the 19th day of November, 1921.

Present: Honorable Learned Hand, District Judge, Presiding.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

The above entitled matter came on to be heard regularly in its order upon order to show cause of this court upon the petition or affidavit of Aaron Ratner why an order should not be made directing the Receiver to turn over, endorse and deliver to said Aaron Ratner any and all checks, moneys, notes or payments made on account of or arising from or in connection with the bills and accounts receivable of the above named Hub Carpet Company until, together with the amounts theretofore collected by said Aaron Ratner, the total of such payments received by him shall amount to $30,000 and interest with costs and disbursements and for other and further relief, and upon the cross application of the Receiver bring-
77 ing an order denying the application of said Aaron Ratner and further directing the said Aaron Ratner to pay to the Receiver forthwith all the sums received by said Ratner from the Hub Carpet Company since the 17th day of September, 1921, and all the receivables turned over to him since that date under the agreement alleged by him and restraining said Aaron Ratner from interfering with deponent's collection of any of the accounts receivable of the Hub Carpet Company, and from making any further claim under his alleged assignment of such receivables, Louis S. Posner, Esq., appearing on behalf of said Aaron Ratner and Selden Bacon, Esq.,

appearing on behalf of the Receiver, and after hearing counsel for the respective parties, and the Court having filed its opinion herein,

Now, upon motion of the said Aaron Ratner, and upon reading and filing the said order to show cause dated October 19th, 1921, and the affidavit or petition of Aaron Ratner thereto annexed verified the 19th day of October, 1921, and the supporting affidavit of Aaron Ratner verified the 28th day of October, 1921, and upon the affidavit of Wallace Benedict verified the 22nd day of October, 1921, and the affidavit of Selden Bacon verified the 24th day of October, 1921, and the further affidavit of Selden Bacon verified the 31st day of October, 1921, and upon the opinion of this Court herein filed the 14th day of November, 1921,

It is hereby ordered and decreed that the above named Wallace Benedict as Receiver of the Hub Carpet Company account to the petitioner Aaron Ratner for all sums received by said Benedict as such Receiver upon any accounts contained in any of the lists
78 of accounts transmitted to Aaron Ratner and that the Bankrupt or its trustee herein execute a formal assignment of the balance of any and all such accounts up to the extent of the unpaid advances of said Aaron Ratner to the Bankrupt, together with interest thereon from the date of such advances, and

It is further ordered and decreed that the petition of the said Benedict as such Receiver that an order be herein made denying the application of said Aaron Ratner and ordering and directing the said Aaron Ratner to pay to said Benedict as such Receiver forthwith all the sums so received by said Ratner from the Hub Carpet Company since the 17th day of September, 1921, and all the receivables so turned over to him since that date under the agreement under which said Ratner claimed and that said Ratner be specifically restrained and enjoined from interfering with the Receiver's collection of any of the accounts receivable of the Hub Carpet Company and from making any further claim under the instrument asserted by him, be and the same hereby is in all respects denied.

LEARNED HAND,
District Judge.

(Endorsed.)

Service of a copy of the within is hereby admitted.
Dated, November 18, 1921.

LOUIS S. POSNER,
Attorney for Aaron Ratner.

79 *Assignment of Errors.*

United States District Court, Southern District of New York.

In re HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Wallace Benedict as Receiver of the Hub Carpet Company, the respondent and petitioner for leave to appeal, hereby assigns the following errors as grounds for his appeal in the above entitled matter:

1. The Court erred in directing the Receiver to account to the petitioner Aaron Ratner for all sums received by him upon any accounts contained in the lists transmitted to Ratner.

2. The Court erred in directing that the bankrupt or its trustee execute a formal assignment of the balances of such accounts to said Ratner up to the extent of his advances.

3. The Court erred in sustaining the assignment to Ratner alleged in the petition as a valid instrument.

4. The Court erred in holding that the assignment to Ratner alleged in the petition was free from fraud.

80 5. The Court erred in holding that if the agreement alleged in the petition had been that the bankrupt should always substitute assigned accounts up to the value of those in existence on May 23, 1921, the security would have been valid.

6. The Court erred in holding that the decision in Robinson v. Elliott, 22 Wallace 513, went upon the doctrine of imputed ownership.

7. The Court erred in holding that the principle of imputed ownership is that on which rests the decision in Skilton v. Codington, 185 N. Y. 80.

8. The Court erred in holding that the New York Courts have not definitely declared the basis of their rule that agreements permitting a mortgagor to sell the mortgaged property and apply the proceeds to his own use under the mortgage were fraudulent and void as against creditors.

9. The Court erred in holding that the rules established by the decisions in Russel v. Winne, 37 N. Y. 591, Edgell v. Hart, 9 N. Y. 213, Potts v. Hart, 99 N. Y. 713, Hangen v. Hachmeister, 114 N. Y. 566, Skilton v. Codington, 185 N. Y. 80, In re Leslie Judge Co., 272 Fed. Rep. 886, and other cases as to the result of a mortgage of allowing the mortgagor, under cover of the mortgage to dispose of the mortgaged property and appropriate the proceeds for its own purposes, was limited in its application to cases of tangible property, and had no application to assigned accounts.

81 10. The Court erred in holding that the case of Sexton v. Kessler could not have been decided as it was except that the property was not chattels.

11. The Court erred in holding that the case of Chapman v. Hunt could not have been decided as it was except that the property was not chattels.

12. The Court erred in holding that the doctrine that allowing the mortgagor under cover of the mortgage to dispose of the mortgaged property and appropriate the proceeds for its own purposes is a fraud and renders the mortgage void depends only upon reputed ownership.

13. The Court erred in holding that the absence of a provision that the assigned accounts should be kept at a given amount could make no difference.

14. The Court erred in holding that the assignment of the accounts to the petitioner Ratner set up in the petition was valid as the parties meant it.

15. The Court erred in holding that the security of such an assignment floats as little when the security is diminished as when it is kept good.

16. The Court erred in holding that the diminution of the security by the mortgagor's appropriating the proceeds of the mortgaged property to its own use by agreement of the lender contemporaneous with the mortgage is a matter merely between the lender and the borrower.

82 17. The Court erred in holding that the monthly transmission to Ratner of lists of existing accounts receivable was an identification of the property assigned.

18. The Court erred in holding that it did not matter whether the assigned accounts were always to be kept at a given figure.

19. The Court erred in holding that the monthly transmission of a list of specified accounts to Ratner was the equivalent of a formal assignment of the accounts contained in the list.

20. The Court erred in holding that there is no local or general law that takes from the transaction the effect it was intended to produce.

21. The Court erred in failing to hold that the assignment of the accounts to Ratner alleged in the petition was affected by a contemporaneous agreement between the parties thereto that the Hub Carpet Company might collect its receivables, the subject of such assignments, and apply the proceeds to its own use, until such time as the petitioner Ratner should demand turning over the same to him.

22. The Court erred in failing to hold that said Ratner made no such demand until the 17th day of September, 1921, and that in the meantime the Hub Carpet Company had, after the execution of such assignment, with the consent of said Ratner, collected on such receivables so assigned to him by the instrument in question and applied to its own use over $150,000, being more than four
83 times as much as the total amount of said Ratner's claim.

23. The Court erred in failing to hold that the Hub Carpet Co. in making the assignment to Aaron Ratner and said Ratner in receiving the same intentionally concealed the same from the persons to whom the Carpet Co. was indebted.

24. The Court erred in failing to hold that the arrangement between the Hub Carpet Co. and the petitioner Ratner for subsequent collection of its receivables by the Hub Carpet Co. and its use of the

proceeds in its own business was intended by them both, among other purposes, to conceal the assignment from the creditors of the Hub Carpet Co. until said Ratner should demand that such receivables be turned over to him.

25. The Court erred in failing to hold the assignment of accounts from the bankrupt to Ratner fraudulent and void.

26. The Court erred in failing to hold that such arrangement for collection of assigned receivables by the Hub Carpet Company and application of the proceeds to its own use made the mortgage fraudulent and void as to the creditors of said Hub Carpet Company and this receiver.

27. The Court erred in failing to hold that by his allowing the Hub Carpet Company to collect and apply to its own use the proceeds of the assigned receivables in excess of the total amount of his claim said Ratner had waived and abandoned all right to other receivables under such assignment of the accounts receivable.

84 28. The Court erred in failing to hold that in so far as it held the transmissions of lists of accounts and bills receivable in the months of July, August and September, 1921, amounted to assignments of such receivables they were preferential, given to secure antecedent indebtedness, and void as preferential under the four months rule.

29. The Court erred in failing to hold that in so far as it held the transmission of a list of accounts and bills receivable in the month of June, 1921, amounted to an assignment of such receivables, it was as to all then pre-existing indebtedness to said Ratner given to secure antecedent indebtedness and void as preferential under the four months rule.

30. The Court erred in refusing to hold that the rule that provisions, contained in or governing any transfer of property as security, that the debtor may dispose of the assigned property and apply the proceeds thereof to his own use, without accounting to the debtor therefor, operate in the most effectual manner to ward off other creditors, and render the transfer fraudulent, and this irrespective of whether the character of the property transferred be tangible or intangible.

31. The Court erred in refusing to order the said Ratner to return to the Receiver all cash, checks and bills receivable belonging to the Hub Carpet Company received by said Ratner between September 16th and 27th, 1921, by virtue of the assignment set forth in the papers on which the petition and cross-petition of the Receiver were heard.

85 32. The Court erred in failing to dismiss on the merits the petition of said Ratner.

33. The Court erred in denying the cross-petition of the Receiver.

34. The Court erred in awarding relief against the Trustee in bankruptcy of the Hub Carpet Company, who was not before the Court.

Respectfully submitted,

SELDEN BACON,
Solicitor for Petitioner.

43 Exchange Place, New York City.

(Endorsed:) Filed Nov. 22, 1921, 10 A. M., U. S. District Court, S. D. of N. Y.

86 *Notice of Filing Bond.*

District Court of the United States of America for the Southern District of New York.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Please take notice, that a bond, of which the annexed is a copy, was duly filed herein on the twenty-second day of November, 1921, with the Clerk of this Court.

Dated New York, November 22, 1921.

Yours respectfully,

SELDEN BACON,
Solicitor for Receiver in Bankruptcy, Appellant.

Office & Post Office Address: 43 Exchange Place, Borough of Manhattan, New York City.

To Louis S. Posner, Esq., Solicitor for Aaron Ratner, Appellee, 15 Broad Street, Borough of Manhattan, New York City.

Service of a copy of the annexed Bond, with notice of filing, is hereby admitted.

Dated November 22, 1921.

LOUIS S. POSNER,
Solicitor for Aaron Ratner, Appellee.

87 *Bond on Appeal.*

District Court of the United States of America for the Southern District of New York, in the Second Circuit.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Know all men by these presents, That Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broad-

way, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Aaron Ratner, in the sum of Five Hundred ($500.00) Dollars to be paid to the said Aaron Ratner, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 21st day of November, 1921.

88 Whereas, the above named Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] WALLACE BENEDICT,
As Receiver of Hub Carpet Company.

[SEAL.] NATIONAL SURETY COMPANY,
By H. E. EMMETT,
Resident Vice-President.

Attest:
N. V. TYNAN,
Resident Assistant Secretary.

89 STATE OF NEW YORK,
County of New York, ss:

On this 21st day of November, 1921, before me personally came the within named Wallace Benedict, to me known, and known to me to be the individual described in and who executed the within bond as Receiver of Hub Carpet Company and acknowledged that he executed the same as such Receiver for the uses and purposes therein expressed.

[Notarial Seal.] WM. G. PHILLIPS.

Notary Public, Kings Co. N. Y. No. 5.
Certificate filed in N. Y. Co. No. 32.
Kings Co. Register's No. 2005.
N. Y. Co. Register's No. 2036.

Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of November, 1921, before me personally came H. E. Emmett, known to *be* to be the Resident Vice-President of

National Surety Company, the corporation described in and which executed the foregoing bond of Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894,
90 that the seal affixed to the within Bond of Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, is the corporate seal of said National Surety Company; and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with N. V. Tynan, and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said N. V. Tynan, subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed in debts and liabilities of every nature whatsoever, by more than the sum of Ten Million dollars.

H. E. EMMETT.
(Deponent's Signature)

Signed, sworn to, and acknowledged before me this 21st day of November, 1921.

[Notarial Seal.]

M. M. MILLER,
Notary Public for Kings County No. 86.

Certificate filed in New York County No. 40.
Bronx No. 1, Queens No. 667 Richmond & Westchester Counties.
Kings County Register's Office No. 2028.
New York County Register's Office No. 2019.
Bronx County Register's Office No. 2200.
My commission expires March 30, 1922.

I approve of the within bond and of the sufficiency of the surety thereon.

JNO. C. KNOX,
U. S. D. J.

91 *Præcipe.*

United States District Court for Southern District of New York.

In Bankruptcy.

No. 30396.

In the Matter of HUB CARPET COMPANY, Bankrupt.

To the clerk of the above-entitled court:

You are requested to certify a transcript (which we will prepare) of the record with the file marks thereon to be filed in the United States Circuit Court of Appeals for the Second Circuit pursuant to an appeal allowed in the above entitled cause and to include in such transcript a record of the following and no other papers or exhibits, to-wit:

1. Order to Show Cause dated October 19th, 1921, signed Learned Hand, U. S. D. J.; affidavit of Aaron Ratner annexed thereto, verified the 19th day of October, 1921, including Exhibit 1.

2. Affidavit of Wallace Benedict verified the 22nd day of October, 1921 with Exhibits A, B, C and D annexed thereto and affidavit of Seldon Bacon verified the 24th day of October, 1921 with Exhibit E annexed thereto submitted in opposition to the motion.

3. Affidavit of Aaron Ratner verified the 28th day of October, 1921, including Exhibit 2 annexed thereto submitted in opposition to said motion.

92 4. Affidavit of Selden Bacon verified the 31st day of October, 1921, submitted in rebuttal.

5. Opinion of Hon. Learned Hand dated November 14th, 1921.

6. Decree entered on decision dated November 19th, 1921.

7. Petition for appeal and allowance thereof by Hon. Learned Hand, United States District Judge, dated November 21st, 1921.

8. Appellant's assignment of errors.

9. Bond on appeal with notice of filing and admission of service thereof.

10. Citation on appeal with admission of service thereon.

Respectfully,

SELDEN BACON,
Attorney for Appellant.

Office and Post Office Address: 43 Exchange Place, Borough of Manhattan, New York City.

(Endorsed.)

Service of a copy of the within Præcipe is hereby admitted.
Dated, December 10, 1921.

LOUIS S. POSNER,
Attorney for Aaron Ratner.

Filed December 12 at 12:30 P. M., U. S. District Court, S. D. of N. Y.

93 *Stipulation.*

United States District Court for the Southern District of New York.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

It is hereby stipulated and agreed that the annexed transcript of record in the above entitled matter is a true copy of all the papers filed and proceedings had and entered in said cause and are true and correct transcripts of the originals and the whole thereof as they appear on file in the Clerk's office of the District Court of the United States, Southern District of N. Y.
Dated, New York, December 28th, 1921.

SELDEN BACON,
Attorney for Receiver as Appellant.
LOUIS S. POSNER,
Attorney for Appellee.

94 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the Matter of HUB CARPET CO.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 28th day of December, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[Seal of the District Court.]

ALEX. GILCHRIST, JR.,
Clerk.

94a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER, Appellee; WALLACE BENEDICT, as Receiver in Bankruptcy of Hub Carpet Company, Appellant.

It is hereby stipulated and agreed that, while Exhibit E of the affidavit of Selden Bacon printed at pages 44 to 58 of the record on appeal in this cause is a correct copy of the stenographer's minutes of the examination of Aaron Ratner under Section 21A, the stenographer's transcript of minutes contained the following errors which Mr. Ratner desired to correct in his testimony in accordance with this stipulation, and which the attorney for the Receiver agree should be made in such testimony prior to signature.

And it is further agreed that the above named court in considering this appeal may treat the record as corrected in accordance with this stipulation, and that arguments may be predicated in the above named court on the Exhibit as so corrected in accordance with this stipulation.

The corrections in question are as follows:

94b In line 6 of folio 135 of the printed record on appeal the words "in December" should be "on September."

In line 1 of folio 140 the word "lend" should be "borrow," and in line 3 thereof the word "mind" should be "want."

Lines 2 and 3 of folio 142 should be corrected to read as follows: "Then I should call it in but as long as I do not find it advisable in any way or manner nobody.'

In Line 9 of folio 145 figures "$16,000" should be "$15,000."

In line 1 of folio 147 the words "That same note became" should be stricken out.

In lines 8 and 9 of folio 148 the words "and made" should be stricken out and the word "making" substituted therefor.

In line 1 of folio 149 the words "notice of" should be inserted after the word "take."

In line 2 of folio 150 the word "account" should be stricken out and the words "list of accounts" inserted in lieu thereof.

In line 5 of folio 160 the word "bought" should be changed to "shipped."

In line 12 of folio 169 the words "use there themselves" should be stricken out and the words "say myself," inserted in lieu thereof.

These corrections are agreed to at the request of the appellee, Aaron Ratner.

Dated, January 6th, 1922.

SELDEN BACON,
Solicitor for Wallace Benedict, Receiver in Bankruptcy, Appellant.
LOUIS S. POSNER,
Solicitor for Aaron Ratner, Appellee.

94c [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. In the Matter of Hub Carpet Company, Bankrupt. Ex Parte Aaron Ratner, Appellee; Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, Appellant. Stipulation as to Record on Appeal. Selden Bacon, Solicitor for Appellant, 43 Exchange Place, New York City. Louis S. Posner, Solicitor for Appellee, 15 Broad Street, New York City.

95 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER, Appellee.

Appeal from an order or decree of the District Court for the Southern District of New York ordering receiver of the bankrupt to account to petitioner, Aaron Ratner, for all sums received upon certain accounts and denying the receiver's motion to pay over to him certain sums theretofore received by Ratner.

Before Hough, Manton, & Mayer, Circuit Judges.

Hub Carpet Company, was what is sometimes called colloquially a family corporation with four officers and stockholders. One of these was Aaron Ratner, the Vice-President. His father Aaron Ratner was not connected in any manner with the corporation but wished to help his son. On May 23, 1921, the Board of Directors held a meeting at which the Treasurer reported that a representative of the well known house of W. & J. Sloane Co. had suggested the advisability of Hub Co. obtaining more money with which "to run the business" and that through Abner Ratner, he (the Treasurer) had arranged to borrow a sum not to exceed $30,000 from Aaron Ratner upon the notes of the company, secured by present and future accounts receivable. Following this report, a resolution was
96 duly adopted authorizing the borrowing on notes and the delivery as security of "an assignment to the said Aaron Ratner of the books of account of the company."

Under the same date an agreement was entered into between Hub Co. and Aaron Ratner, whereby Ratner bound himself to make loans from time to time up to $30,000, these loans to be evidenced by the notes of Hub Co.

Further, Hub Co. assigned and transferred as collateral security all accounts then and thereafter to become due in the ordinary course of business. Hub Co. agreed to keep Ratner fully advised of its financial condition and authorized him "to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued."

It is not disputed that it was understood that Hub Co. should go on collecting its receivables and using the proceeds thereof without accounting to Aaron Ratner until he so required.

Pursuant to the agreement, Hub Co. delivered to Aaron Ratner monthly a list of receivables, showing collections, changes in the accounts and new receivables, or, in brief, a statement of the situation as it currently stood. The last letter, i. e., that of September 23, 1921, transmitting the September list is typical of the routine between the parties. It read: "Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23, 1921."

97 Up to September 17, 1921, Ratner had not asked and proceeds of the receivables. At that time, however, he became disturbed because of the pressure of creditors and demanded the protection of his agreement and it was agreed that he should receive "checks that would thereafter come in in connection with its (the Co.'s) accounts receivable". Thereafter, Ratner received the checks, trade acceptances and notes which came in from Hub Co.'s debtors who were mentioned on the lists. These receivables were turned over to Aaron Ratner "in precisely the form in which they were received."

It is this amount which the receiver demands and it is the difference between $30,000 and this sum of $11,581.78 with interest which Ratner demands from the receiver, the petition in bankruptcy against Hub Co. having been filed September 26, 1921.

Selden Bacon for receiver appellant.
Louis S. Posner for Aaron Ratner appellee.

MAYER, *Circuit Judge:*

There is nothing in this record to warrant even a suggestion of fraud. The loan by Ratner and the assignment by Hub Co. of the accounts receivable constituted a legitimate and business like transaction whereby a considerate father was willing to help his son and the latter's associates in maintaining what, at the time, seemed to be a hopeful business.

The questions involved, therefore, are solely questions of law. We shall speak of the receiver as a trustee in bankruptcy and as though the application of Ratner had been made after the appointment of a trustee in view of our recent decision in Matter of Max Mitchell, — F. R., —, filed January 1922.

98 The status and powers of a trustee under Section 47*a* of the Bankruptcy Act, as that section now reads since the amendment of 1910, were decisively dealt with in Bailey v. Baker Ice Machine Co., 239 U. S. 268, 275, 276. In that case, Baker Ice Machine Co. had made an agreement with Grant Brothers for the conditional sale of a machine, the title remaining in Baker Co. until the purchase price was fully paid and the machine being in the possession of Grant Brothers.

Under the recording law of Kansas, a contract of conditional sale is valid between the parties whether filed for record or not, but is void against a creditor of the vendee "who fastens a lien upon the

property by execution, attachment or like legal process before the contract is filed for record". The contract was made October 14, 1911 and filed for record May 15, 1912. On June 11, 1912, Grant Bros. filed their voluntary petition in bankruptcy and on the following day were adjudged bankrupts. At that time, the chattel which was the subject matter of the controversy was found in the possession of the bankrupts. Between October 14, 1911 and May 15, 1912, no creditor had "fastened a lien upon the property by execution, attachment or other legal process". It was contended that section 47*a*, clause 2 of the Bankrupcy Act, as amended in 1910, c. 412, Stat. 838, 840, gave a trustee the status of a creditor having such a lien. The court held, however, "That the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed."

See also

In re Morris, 204 F. R. 770;
Matter of P. Jesse Matton—decided January 18, 1922.

99 On September 26, 1921, the date of filing of the bankruptcy petition, in the case at bar, there were no receivables upon which any creditor had "fastened a lien". On September 23, 1921, when the September list was delivered to Ratner pursuant to the agreement of May 23, 1921 that act was equivalent to the taking of possession in the case of a chattel or to the recording of a mortgage under a state statute.

There was nothing further nor better which could have been done by the parties to perfect Ratner's lien or to reduce to possession what the parties had called the "collateral security".

There was no way by which Hub Co. could physically deliver notes, checks, or other evidences of debt from customers which had not yet been received and the only practicable method of conferring title and possession was by the delivery of the list in compliance with the demand of September 17, as contemplated by the agreement of May 23.

Indeed, on this branch, the case is well within Union Trust Co. v. Bulkley, 150 F. R. 510.

Gregory v. Morris, 96 U. S. 619;
McCaffrey v. Woodin, 65 N. Y. 459, 463.

100 In Wilds v. Board of Education, 227 N. Y. 211, the court in distinguishing that case from Titusville Iron Co. v. City of New York, 207 N. Y. 203, stated that the "all important difference between the two cases is, however, the time of possession."

In view, therefore, of the fact that Ratner had title to the accounts receivable and possession thereof, as matter of law, prior to the filing of the bankruptcy petition, the sole remaining question is whether the agreement between Ratner and Hub Co. was inherently void because Hub Co. was permitted to reserve the right to use the proceeds of these receivables until and unless Ratner demanded that they should be turned over to him.

It is "to be borne constantly in mind that the state law determines the efficiency of acts and transactions to effect the transfer of title of the property involved."

Remington on Bankruptcy, Second Edition, Vol. II Secs. 1140 & 1275.
Sexton v. Kessler, 225 U. S. 90;
In re Doran, 154 F. R. 467.

In New York, accounts receivable are not "goods or chattels" (Lien Law sec. 230, Personal Property Law, sec. 360, Niles v. Matthusa, 162 N. Y. 546) and, therefore, do not come within the provisions of recording or filing acts.

There has grown up, however, the doctrine of reputed or ostensible ownership. This doctrine seems to have had its origin in Twyne's case, 3 Coke Rep. 80*b*, referred to in Robinson v. Elliott, 22 Wall. 513 and in sections 176 et seq. of Mr. Garrard Glenn's
101 thoughtful work on "The Rights and Remedies of Creditors respecting their Debtor's Property." The doctrine is thus stated by Mr. Glenn in section 173 of his book.

"The situation with which we will now deal is where a man, not the owner of the property, is held out as the owner under such circumstances as would be reasonably calculated to induce the extension of credit to him upon the faith of his apparent ownership. In such a case, when he becomes insolvent, the question is whether the true owner can assert his title to the property in question as against the persons who have become creditors of the apparent owner."

In Robinson v. Elliott, supra, a mortgage was executed which provided that the mortgagors "may remain in possession of said goods, wares, and merchandise, and may sell the same as heretofore and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage."

The Supreme Court said:

"Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion."

See also

Frelinghuysen v. Nugent, 36 F. R. 220;
Griswold v. Sheldon, 4 N. Y. 581, 590;
Stackhouse v. Holden, 66 App. Div. 423, at page 427.

But the cases to which this doctrine of reputed or ostensible ownership has been applied are those where the personal
102 property is visible.

The American doctrine of reputed ownership, does not, however, apply to choses in action. As Glenn puts the point: "It may be said that no one can be in the apparent ownership of a chose in action, because there is no possibility of an effective ostentation of ownership by means of possession."

It is, perhaps, going too far to say that men get credit only because of what they apparently own or that they never get credit because of the ownership of choses in action which may not be physically seen.

This distinction has developed historically, but a further reason for the exclusion of choses in action from the rule of reputed ownership is that courts in their decisions have been reflective of the course of business in the commercial world.

It is matter of common knowledge that the merchant utilizes his accounts receivable and other kinds of choses in action to keep his business liquid and everyone expects that he may sell or pledge such choses in action for that very purpose. On the other hand, it is ordinarily assumed that the goods and chattels in his place of business belong to him and may freely be dealt with by him.

It is mainly because of commercial usages and necessities that the courts have not included accounts receivable within the doctrine of ostensible ownership, but on the contrary have excluded them therefrom.

Stackhouse v. Holden, 66 App. Div. 423.

The case at bar does not turn upon any question as to the right of substituting security for that withdrawn which was one of
103 the questions in Sexton v. Kessler, 225 U. S. 90, nor on the question as to whether a later transaction was merely the consumation of an earlier agreement as in Chapman v. Hunt, 254 F. R. 768. Underlying these cases as well as Greey v. Dockendorff, 231 U. S. 513, is this principle of exclusion from the reputed ownership rule, which we apply to this case. As Mr. Justice Holmes points out in Greey v. Dockendorff, supra, "The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business but we have no such statute" nor on the facts in the case at bar was there (again to quote from Mr. Justice Holmes) "a moment when the goods (here the receivables) could have been attached."

The case nearest that at bar is Stackhouse v. Holden, supra, and, although the court was not unanimous, we think the opinion of Nash, J. ably stated the principles here applicable.

From the foregoing, it follows that the receiver (or trustee if since appointed) must account and pay over to Ratner any and all proceeds representing collections by the receiver or trustee of the debts set forth on the list of September 23, 1921 and on all prior lists up to an amount sufficient to pay the balance beyond $11,581.78 with appropriate interest. The decree below properly provided that the

bankrupt or its trustee execute a "formal assignment" to Aaron Ratner of the accounts not yet collected. We are not informed as to whether there were any accounts due Hub Co. not mentioned on these lists or arising between September 23rd and September
104 26th. If there were such, Ratner is not entitled to the same, because he took no steps to perfect his lien in respect thereof or to reduce such collateral security to possession.

The decree is affirmed with costs.

105 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Hub Carpet Company. (Copy.) Opinion. Mayer, C. J.

106 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit held at the Court Rooms, in the Post Office Building, in the City of New York, on the 24th day of April, one thousand nine hundred and twenty two.

Present:

Hon. Charles M. Hough,
Hon. Martin T. Manton,
Hon. Julius M. Mayer,
Circuit Judges.

In the Matter of the HUB CARPET COMPANY, Bankrupt; WALLACE BENEDICT, as Receiver, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

C. M. H.
M. T. H.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Hub Carpet Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 24, 1922. William Parkin, Clerk.

107 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 107 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Hub Carpet Company, Bankrupt, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of May in the year of our Lord One Thousand Nine Hundred and twenty-two and of the Independnce of the said United States the One Hundred and forty-sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

108 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of Hub Carpet Company, Bankrupt; Ex parte Aaron Ratner, appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
109 of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,949. Supreme Court of the United States, October Term, 1921. No. 994. Wallace Benedict, as Receiver in Bankruptcy of the Hub Carpet Company, vs. Aaron Ratner. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 15, 1922. William Parkin, Clerk.

110 Supreme Court of the United States, October Term, 1921.

No. 994.

WALLACE BENEDICT, as Receiver in Bankruptcy of the Hub Carpet Company, Petitioner,

against

AARON RATNER, Respondent.

The Supreme Court of the United States having issued a writ of certiorari under date of June 12th, 1922, to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, directing and commanding them to send to the said Supreme Court the record and proceedings in this cause, which was a suit entitled in the said Circuit Court of Appeals "In the Matter of Hub Carpet Company, Bankrupt; ex-parte Aaron Ratner, Appellee",

It is hereby stipulated and agreed that the transcript of record in the said matter already on file in the office of the Clerk of the United States Supreme Court, filed with the petition for certiorari in this matter, may be taken as a return to the writ.

Dated, New York, June 14th, 1922.

SELDEN BACON,
Solicitor for Petitioner Wallace Benedict, as Receiver in Bankruptcy.
LOUIS S. POSNER,
Solicitor for Aaron Ratner, Respondent.

111 [Endorsed:] Supreme Court of the United States, October Term, 1921. No. 994. Wallace Benedict as Receiver in Bankruptcy of the Hub Carpet Company, Petitioner, against Aaron Ratner, Respondent. Stipulation. Selden Bacon, Solicitor for Petitioner, 43 Exchange Place, Borough of Manhattan, New York City.

112 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation

of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, June 15, 1922.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

113 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Wallace Benedict, as Receiver, etc. vs. Aaron Ratner. Return to Certiorari.

114 [Endorsed:] File No. 28,949. Supreme Court U. S., October Term, 1922. Term No. 400. Wallace Benedict, Receiver etc., Petitioner, vs. Aaron Ratner. Writ of certiorari and return. Filed June 17, 1922.

No. 11

FILED
MAY 26 192
WM. R. STANS
CL

Supreme Court of the United States

OCTOBER TERM, 1921.

No.....

WALLACE BENEDICT as Receiver in Bankruptcy of the Hub Carpet Company,

Petitioner,

against

AARON RATNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

SELDEN BACON,
Counsel for Petitioner,
43 Exchange Place,
New York City.

1

Supreme Court of the United States

OCTOBER TERM, 1921.

No. .....

WALLACE BENEDICT as Receiver in Bankruptcy of the Hub Carpet Company,
Petitioner,
against
AARON RATNER,
Respondent.

2

PLEASE TAKE NOTICE that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit, and the annexed brief in support thereof, together with a certified copy of the record on appeal to the Circuit Court of Appeals and of the record of that Court, will be submitted to the Supreme Court of the United States at the Capitol at Washington in the District of Columbia, at the opening of court on the 29th day of May, 1922, or as soon thereafter as counsel can be heard.

3

Dated, May 4th, 1922.

SELDEN BACON,
Counsel for Petitioner,
43 Exchange Place,
New York City.

To:
LOUIS S. POSNER, Esq.,
Counsel for Respondent.

4 **Supreme Court of the United States**

WALLACE BENEDICT as Receiver in Bankruptcy of the Hub Carpet Company, Petitioner, against AARON RATNER, Respondent.	October Term, 1921.

PETITION FOR CERTIORARI.

5 *To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Wallace Benedict, as Receiver and Trustee in Bankruptcy of the Hub Carpet Company, respectfully shows:

First: That the Hub Carpet Company is a New York corporation which was doing business in the City of New York from January 1st until September 26th, 1921, on which latter date your petitioner was duly appointed receiver in bank-
6 ruptcy of the Hub Carpet Company and duly qualified as such. That thereafter and on the 17th day of October, 1921, said Hub Carpet Company was adjudicated a bankrupt and thereafter, to wit, on the 25th day of November, 1921, your petitioner was duly elected and qualified and ever since has been the Trustee in Bankruptcy of said Hub Carpet Company.

Second: Your petitioner further shows that on 7
the 19th day of October, 1921, the above named Aaron Ratner filed his petition in equity in the United States District Court for the Southern District of New York asserting that all the accounts receivable of the bankrupt, both present and future, had been assigned to him on May 23rd, 1921, by the bankrupt corporation as collateral security for loans previously made and to be thereafter made by him, which amounted to $30,000 and interest. That it appeared that the said assignment was executed under an oral contemporaneous agreement that the bankrupt might go on collecting its receivables and using the pro- 8
ceeds thereof in its business until the assignee of the receivables should call on it to turn over the proceeds of the receivables to him, and the assignment itself contained the following two clauses:

> "We, the Hub Carpet Company, further covenant and agree to fully disclose our business and financial conditions at any time the said Aaron Ratner so demands and hereby authorize him to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued.
>
> We further covenant and agree with the 9
> said Aaron Ratner on demand to turn over to the said Aaron Ratner any and all payments made to us by our debtors and to be applied by him in payment of any obligations due him, notwithstanding that the time for the payment of said obligations held by him at that time has not in fact become due and payable."

10 The respondent did not ask to have the accounts turned over to him until the 17th day of September, 1921, and meantime the bankrupt had collected and used in its own business for its own purposes over $150,000 proceeds of accounts covered by the assignment. The claimant Mr. Ratner testified with regard to the arrangement for his security as follows:

> "They told me they wanted, they could not, it would be kind of compromising themselves to be giving away the checks, somebody should collect it and they could not do it; so they said that they could do it providing they made arrangements that they should be able to
11 keep on collecting the checks and everything until I will find it advisable then I should call it in, but as long as I do not find it advisable in any way or manner nobody should know about it and they should keep on collecting the checks.
>
> "Q. And using the money? A. And using the money, certainly."

It was claimed by your petitioner, the Receiver and Trustee in bankruptcy of the assignor, that an arrangement of this character rendered the assignment fraudulent and void as to him and as to the creditors whose interests he represented.

It was insisted by the claimant, Mr. Ratner, that
12 the arrangement made was in no way actually fraudulent and that the same was not in law fraudulent, on the sole ground that the assignment was exclusively of non-tangible receivables and not of personal property subject to manual possession.

The doctrine was laid down by this Court in 13
Robinson vs. *Elliott,* 22 Wall. 513, 526, at pages 523 to 526 that an agreement that a mortgagor under cover of a mortgage, might go on and sell the goods as his own, and appropriate the proceeds to his own purposes, shielded the property of the debtor, so that creditors would be delayed in the collection of their debts, and made the instrument fraudulent.

In the present case it has been held below, that that rule is predicated exclusively on manual possession of tangible property, and a consequent appearance of ownership growing out of such physical possession, and was inapplicable to intangible 14
property. This constitutes the central question in the case.

Your petitioner contends that the doctrines of *Robinson* vs. *Elliott,* 22 Wall. 513; of *Russell* vs. *Winne,* 37 N. Y. 591; *Skilton* v. *Coddington,* 185 N. Y. 80; *Griswold* v. *Sheldon,* 4 N. Y. 581; *Southard* v. *Benner,* 72 N. Y. 424; *Zartman* v. *First National Bank,* 189 N. Y. 267; and *In re Leslie-Judge Company,* 272 Fed. Rep. 886, as to such provisions, are not limited in their application to property capable of manual possession, but apply equally to intangible property; and that the vice of such transactions lies in this: that there is in fact no real 15
transfer, no real vesting of title in the assignee but such an arrangement whereby the title and authority of the assignor are to be unrestricted as long as he is able to shunt along his business, but that whenever a crash comes, then by some sort of legerdemain the written assignment is to be stimulated into life to prefer the claim of the assignee, is equally a fraud whether applied to chattels or

16 to choses in action; and that a transfer which at one time places no bar to the ownership of the assignor and in another exigency is intended to be absolute, is invalid as a fraud irrespective of manual possession, and cannot be upheld against creditors seeking an equal distribution of all the assets of the bankrupt.

Your petitioner urges that the fraudulent character of the instrument is just as real in the case of receivables, as it is in the case of tangible property, and the inherent fraudulent element is the same in the one case as in the other, and is not dependent upon any appearance of ownership
17 flowing from manual possession.

Your petitioner urges that all decisions holding that recorded *chattel* mortgages containing such clauses are void, are decisions that the physical possession of the property is not the determining element. Any impropriety arising from continued physical possession of the property is prevented by recording the instrument, but the same nevertheless remains void for the fraud. *Ergo,* the fraud does not arise out of the appearance of title created by possession.

The Circuit Court of Appeals sustained all the contentions of the claimant and held here that such provisions do not affect the validity of an assign-
18 ment of receivables, whereas in the case of *In re Leslie-Judge Company,* 272 Fed. Rep. 886, it held that a provision in a chattel mortgage allowing the sale of parts of a plant which had become useless and use of the proceeds thereof by the mortgagor, constituted fraud in law and invalidated the instrument even as to intangible articles assigned by its provisions.

Your petitioner is advised that said decree of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting equity proceedings arising in bankruptcy proceedings, otherwise made final in the Circuit Court of Appeals, to be certified to this Court for review. Your petitioner shows that the said Circuit Court of Appeals erred in holding that the said assignment was fraudulent.

Your petitioner further shows that said Circuit Court of Appeals erred in holding that the principle that provisions for continuing to handle the property as the assignor's own, and to use the proceeds for its own purposes, render assignments fraudulent, is applicable only in the case of assignments of tangible property and by reason of the appearance of ownership flowing from possession.

Your petitioner shows that the Circuit Court of Appeals also erred in holding that such assignment was an effective security from the day of its execution.

General Reasons For Allowance of Writ.

The decision below is that provisions in an assignment of receivables, made for purposes of collateral security, covering all present and future receivables of the assignor, that the assignor shall go on collecting the receivables and using the proceeds in its business until notified by the assignee to turn them over to him do not render

such an assignment fraudulent as against the creditors of the assignor, though unquestionably they would have such effect on a chattel mortgage.

If this ruling is correct, it affects most seriously the whole commercial credit system of the country.

It is believed that this ruling is in conflict with the decision of this court in *Robinson* vs. *Elliott,* 22 Wall. 513, 523-536, and with numerous decisions of the New York Court of Appeals cited below.

The decision at bar is distinguished by the Court below from a prior decision of its own holding a chattel mortgage void (*In re Leslie-Judge Company* case, 272 Fed. Rep. 886), solely by the fact that all the property covered by the assignment here was receivables and intangible, while in that case a minor part of the property was tangible.

The present decision in the Circuit Court of Appeals is, according to our view, in conflict with the principles established by this Court in *Robinson* vs. *Elliott,* 22 Wall. 513, and is also in conflict with the principles laid down in the following New York cases:

Russell v. *Winne,* 37 N. Y. 591;
Skilton v. *Codington,* 185 N. Y. 80, 90;
Griswold v. *Sheldon,* 4 N. Y. 581, 588-590;
Southard v. *Benner,* 72 N. Y. 424;
Zartman v. *First Natl. Bank,* 189 N. Y. 267.

The case of *Stackhouse* v. *Holden,* 66 A. D. 423, holding to the contrary was by an intermediate appellate New York court, and was a decision

rendered by three judges with two judges dissenting, the latter in a most vigorous opinion written by Justice Spring. That decision does not established the law of New York as against the repeated decisions and opinions of the Court of Appeals. 25

It has not been understood at the bar that this rule as to fraud was limited as held below in the present case. If that fact becomes generally understood scarcely a bankruptcy will come into the courts without the appearance of such an assignment of the receivables. The matter is, therefore, of public importance, not only affecting seriously the credit office of every business house in the country, but also as likely to affect numberless cases in the bankruptcy courts; and a definite and final decision with regard to this doctrine should be made by this Court. 26

The question presented is a square question of common law and that question of law has been squarely decided in both courts below. The amount involved here is but $30,000 but the decision as affecting business relations of the community and the administration of the Bankrutpcy Law is of the most far reaching importance.

Facts.

27

The evidentiary facts are practically undisputed.

The claimant, Ratner, presented an affidavit and order to show cause alleging that an assignment had been made to him by the bankrupt, four months and three days before the filing of the petition in bankruptcy, of all its receivables, pres-

ent and future, as collateral security for loans, and a prayer that the bankrupt and the receiver turn over to the claimant Ratner the receivables of the bankrupt and any moneys collected thereon until his claim of $30,000 with interest was satisfied.

Ratner, during the last ten days preceding the filing of the petition in bankruptcy, had demanded that the proceeds of the receivables be delivered to him under this assignment. During that week he received in cash or checks $11,581.75 and in notes and trade acceptances (which he had not up to that time been able to collect), $2,212.66 more. Disregarding the last item, he claimed there was a balance due him of $18,418.25. He annexed to his petition a copy of the instrument under which he claimed, which contained the clauses quoted above.

The receiver showed cause that the assignment was admittedly affected by a contemporaneous express collateral agreement that the bankrupt, despite the assignment, should be allowed to continue to collect its receivables and use the proceeds in the course of its business until the petitioner should become disturbed about recovering his claim and demand that the proceeds of the receivables be turned over to him. Provisions for such demand appeared in the assignment itself. The claimant Ratner personally gave the following account of the transaction:

> " * * * They told me they wanted, they "could not, it would be kind of compromis- "ing themselves to be giving away the checks, "somebody should collect it and they could

"not do it; so they said that they could do 31
"it providing they made arrangements that
"they should be able to keep on collecting
"the checks and everything until I will find
"it advisable then I should call it in, but as
"long as I do not find it advisable in any
"way or manner nobody should know about it
"and they should keep on collecting the
"checks.

"Q. And using the money? A. And using "the money, certainly" (fols. 141-142, as corrected by stipulation).

Your petitioner further showed that the receivables did so remain in possession of the bankrupt from the delivery of the assignment, which was 32
asserted by the petitioner to have been made on the 23rd day of May, 1921, until the 17th of September, 1921, the bankrupt during that period collecting and using over $150,000 out of such (allegedly) assigned receivables with the consent of the assignee, Mr. Ratner, and the Receiver claimed that the assignment of the receivables was consequently fraudulent and void.

Whether any of the remaining receivables or any of those collected by or turned over to Ratner during the week preceding the appointment of the receiver had existence at the time the assignment was made, in May, 1921, or were then future re- 33
ceivables, was wholly undisclosed by the record. Mr. Ratner testified that the receivables on May 23rd amounted to between $110,000 and $120,000; that on September 17th the total of receivables had been reduced to $90,000. It was undisputed that $150,000 of receivables had been collected and used by the bankrupt in its business between May

23rd, 1921, and September 17th, 1921, with Ratner's consent.

The petition in bankruptcy was filed and the Receiver appointed on September 26th, 1921.

The Receiver also claimed that if the assignment was galvanized into life by the delivery of the collections to Ratner during the last week before the bankruptcy, that galvanization could affect only the $12,000 paid over to him, and even as to that it would be preferential.

The District Court and the Circuit Court both held that under these conditions, concerning which there was no dispute, the assignment was entirely valid as against the creditors of the bankrupt, and the receiver and trustee, and have not only sustained Ratner's claim to the $12,000 received by him, but have ordered the Receiver and Trustee to pay $18,000 more to Ratner to satisfy his lien, as a first claim.

Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the Circuit Court of Appeals and of the record in the last-named Court.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, requiring said Court to certify and send to this Honorable Court on a day certain, to be therein designated, a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in the cause therein entitled In the Matter of Hub Carpet Company, Bankrupt, Ex-parte Aaron Ratner, Appellee, Wallace Benedict as Receiver in Bankruptcy of Hub Carpet Company,

Appellant; to the end that the said cause may be 87
reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

WALLACE BENEDICT,
As Receiver and Trustee in Bankruptcy of Hub Carpet Company, Bankrupt.

SELDEN BACON,
Solicitor and Counsel for Receiver and Trustee.

SOUTHERN DISTRICT OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

88 WALLACE BENEDICT, being duly sworn, deposes and says: That he is the petitioner herein in the making of the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

WALLACE BENEDICT.

Sworn to before me this 4th day of May, 1922.

WM. G. PHILLIPS,
(Notarial Seal) Notary Public,
Kings Co., N. Y. No. 35.
Certificate filed in N. Y. Co. No. 76.
Kings Co. Register's No. 4033.
N. Y. Co. Register's No. 4103.

89

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issue of the writ of certiorari prayed for.

SELDEN BACON,
Of Counsel.

INDEX OF POINTS.

I.

The Circuit Court of Appeals erred in holding that the doctrine—that an agreement that an assignment of property as collateral security to secure the assignee for a debt due him from the assignor, which provides that the assignor may use and dispose of the property as his own and use the proceeds in his business until the assignee shall determine to take possession of the property, makes the assignment fraudulent,—applies only in the case of tangible property and has no application to an assignment of accounts receivable.

p. 6.

II.

The decisions in Sexton v. Kessler, 225 U. S. 90, and in Chapman v. Hunt, 254 Fed. Rep. 768, in no way conflict with the rule we invoked.

p. 13.

III.

Even were the rule predicated on a false appearance of ownership, the facts here supply the equivalent and more than the equivalent of any false appearance of ownership arising from possession of tangibles. There was the actual appearance of ownership deliberately preserved and sustained, and deliberate concealment of the assignment to avoid the obvious and contemplated consequences of disclosure of the fact of the assignment of all receivables present and future.

p. 15.

IV.

If the assignment was galvanized into actuality by Ratner's taking over the checks as they came in, during the last week before the bankruptcy, that galvanization process went no further than his actual receipts of about $12,000, and the decree for further payment to him of some $18,000. is erroneous. Moreover as to the $12,000 the transaction was preferential.

p. 17.

V.

The main question presented is of the utmost importance to the business community and to the administration of the Bankruptcy Act.

p. 18.

VI.

The petition should be allowed and the writ be issued.

p. 20

INDEX OF CASES.

	PAGE
Blunerhasset v. Sherman, 105 U. S. 100	17
Chapman v. Hunt, 254 Fed. 768	13, 14
Edgell v. Hart, 9 N. Y. 213	8
Frost v. Warren, 42 N. Y., 204	1
Gardner v. McEwen, 19 N. Y. 123	1, 8
Griswold v. Sheldon, 4 N. Y. 581	6, 8
In re Leslie-Judge Co., 272 Fed. 886	6, 8
In re Marine Construction Co., 144 Fed. 649	8
In re Volence, 197 Fed. 232	6, 8
Mittnach v. Kelly, 3 Abb. Ct. App. Dec. 301	8
Paget v. Perchard, 1 Esp. 205	8
Robinson v. Elliott, 22 Wall. 513	2, 6, 7, 8, 9, 10, 11 12, 17, 19
Russell v. Winne, 37 N. Y. 591	6, 8, 9
Sexton v. Kessler, 225 U. S. 90	13, 14
Skilton v. Codington, 185 N. Y. 80	6, 8
Southard v. Benner, 72 N. Y. 424	6, 8
Stackhouse v. Holden, 66 A. D. 423	12, 13
Vilas Nat'l Bank v. Newton, 25 A. D. 62	8
Wood v. Lowny, 17 Wend., 492	8
Worrall v. Smith, 1 Camp. 322	8
Zartman v. First Nat'l Bank, 189 N. Y. 267	6, 8

Supreme Court of the United States

WALLACE BENEDICT as Receiver in Bankruptcy of the Hub Carpet Company, Petitioner, against AARON RATNER, Respondent.	October Term 1921

BRIEF FOR PETITIONER FOR WRIT OF CERTIORARI.

The question presented by this case is an extremely simple one based on facts practically undisputed and is this:

The rule is well established, both in the Federal Courts and in the Courts of the State of New York, that a chattel mortgage, containing a provision that the mortgagor may dispose of the property and use the proceeds for his own purposes, without accounting to the mortgagee, is fraudulent and void as against creditors, even though it be recorded.

This rule applies equally whether the provision be incorporated in the instrument or collateral thereto.

Frost v. *Warren*, 42 N. Y. 204;
Gardner v. *McEwen*, 19 N. Y. 123.

Does this doctrine apply exclusively in the case of tangible property, the subject of manual possession, left in the possession of the owner, or will

it apply also to an assignment exclusively of receivables, present and future, for purposes of collateral security?

The Court below has held that the rule is predicated on the appearance of ownership flowing from possession and that there can be no such appearance of ownership flowing from possession in the case of receivables because they are not the subject of manual possession.

The evidentiary facts were undisputed and the question is one of pure law.

The resultant rule is of the most widespread interest in the commercial world and we believe it would be in flat contradiction of the doctrines announced by this court in *Robinson* vs. *Elliot,* where, in stating that principle, this court apparently did not derive it from any matter of appearance of possession, but from the inherent duplicity of such an instrument, which is valid as a chattel against his creditors when the debtor wants it to be and of no validity when he wants to use the proceeds himself, and we understand the decisions of the New York Court of Appeals to hold that same doctrine.

The facts are these:

A petition in bankruptcy was filed against the Hub Carpet Company, the above named bankrupt, on the 26th day of September, 1921, and Mr. Benedict was immediately appointed receiver and qualified.

Immediately upon his taking possession of the property, Mr. Ratner, the claimant, presented an assignment to him of all receivables, present and future, of the Company, dated May 23rd, 1921, four months and three days prior to the filing of

the petition in bankruptcy, and stated that at the time the assignment was made, he renewed a loan of $15,000 to the corporation and about the first of July loaned them $15,000 additional, and that this debt was unpaid, except that during the week preceding the bankruptcy proceeding, there had been turned over to him some $12,000 of collections.

Prior to that time and since the assignment, the bankrupt with Ratner's consent had collected and used for its own purposes over $150,000. The total receivables at the time the assignment was made were less than $120,000 and a week before the bankruptcy, when the bankrupt began to turn the collections over to Mr. Ratner, were but about $90,000. Whether any of the receivables in existence on the 17th of September were in existence on the 23rd of May or had passed by the assignment of future receivables was undisclosed.

The assignment contained the two following clauses:

> "We, the Hub Carpet Company, further "covenant and agree to fully disclose our "business and financial conditions at any time "the said Aaron Ratner so demands and here-"by authorize him to enforce this assignment "at any time that in his judgment it may be "for his interest to do so notwithstanding the "time for the payment of the notes has not in "fact accrued.
>
> "We further covenant and agree with the "said Aaron Ratner on demand to turn over "to the said Aaron Ratner any and all pay-"ments made to us by our debtors and to be "applied by him in payment of any obliga-"tions due him, notwtihstanding that the "time for the payment of said obligations

"held by him at that time has not in fact "become due and payable." (Record, fols. 32-33).

And the claimant and his son, the official of the bankrupt who negotiated the arrangement with him, respectively gave the following testimony:

The son testified:

"We worked out the best way to secure him "without affecting us personally, that is by "not having him collect accounts or anything "of that sort." (Record, fol. 104.)

and again:

"We told him that we would not under any "conditions have him make our collections for "us, do you see, and one of the stipulations "was that we were to collect them." (Record, fol. 108.)

The claimant Aaron Ratner testified:

"They told me they wanted, they could not, "it would be kind of compromising themselves "to be giving away the checks, somebody "should collect it, and they could not do it, "so they said they could do it, providing they "made arrangements that they should be able "to keep on collecting the checks and every-"thing until I will find it advisable then I "should call it in but as long as I do not find "it advisable in any way or manner, nobody "should know about it and they should keep "on collecting the checks.

"Q. And using the money? A. And using "the money, certainly" (fols. 141-142, as corrected by stipulation on file).

Upon this state of facts, the receiver claimed that the assignment was fraudulent and void as against the creditors and hence Mr. Ratner brought his petition in equity in the bankruptcy proceeding, demanding that the court order the receiver (and trustee as he became) to pay over the balance necessary to satisfy his lien, a matter of some $18,000. The receiver resisted this application, on the ground that the assignment was fraudulent and void; that it was fraudulent in law and the declared intention of the parties to keep the matter secret made it actually fraudulent, and prayed that Ratner be required to return the $12,000 turned over to him pursuant to the assignment just before the bankruptcy.

The District Court held that the assignment was not fraudulent but valid, on the ground that the rule that such contracts are fraudulent and void as against creditors was predicated exclusively on the appearance of ownership flowing from possession of the property, and directed the receiver and trustee to turn over the receivables to the claimant, Mr. Ratner, to an amount sufficient to satisfy his claim, sustaining that claim as a prior lien.

That decision was unanimously affirmed by the Circuit Court of Appeals on the same ground; the court holding that the agreement would unquestionably have rendered the assignment void had it been one of tangible property, but had no such effect on an assignment of receivables not capable of manual possession.

POINT I.

The Circuit Court of Appeals erred in holding that the doctrine—that an agreement that an assignment of property as collaterial security to secure the assignee for a debt due him from the assignor, which provides that the assignor may use and dispose of the property as his own and use the proceeds in his business until the assignee shall determine to take possession of the property, makes the assignment fraudulent,—applies only in the case of tangible property and has no application to an assignment of accounts receivable.

In re Leslie-Judge Co., 272 Fed. Rep. 886;
Russell v. *Winne*, 37 N. Y. 591;
Skilton v. *Codington*, 185 N. Y. 80, 90;
Griswold v. *Sheldon*, 4 N. Y. 581, 588-590;
Southard v. *Benner*, 72 N. Y. 424;
Zartman v. *First Natl. Bank*, 189 N. Y. 267;
In re Volence, 197 Fed. Rep. 232;
Robinson v. *Elliot*, 22 Wall. 513, 525-527.

We think an examination of these cases, and others, shows clearly that the basic principle of this rule is not predicated on any appearance of ownership of the property growing out of its physical possession, but on the two-faced character of the

instrument, making it a shield of the debtor's property against his other creditors, while leaving it no obstacle to the debtor's using his property as he will, and the fact that an instrument so qualified is not a real security but is intended for ulterior and fraudulent purposes and operates in fraud of creditors.

It seems to us that the learned court below has confused two independent principles, though frequently both apply to a single transaction. There is a rule that is based on such appearance of ownership growing out of continued possession. It is the familiar one, now limited by statutes, so that *unrecorded* chattel mortgages are void (in many States only against creditors or purchasers *without notice*) where the mortgagor remains in continued possession. *That* statutory rule unquestionably found its origin in the fact that the mortgagor is clothed by possession with a fallacious appearance of title. And provisions for recording chattel mortgages were devised to remove that appearance and to cure that defect by giving notice, while saving the advantages of honest mortgages (22 Wall. 523).

Decisions holding that such agreements as we are here considering do avoid mortgages, even though they be recorded, and even though the mortgagee takes and holds possession of the property can not rest on any such principle of apparent ownership, growing out of physical possession, but on some other and different basic principle, not cured by removing that appearance.

Cases implying that the rule is not based on any appearance of ownership growing out of possession but on the fraudulent character of the arrangement we find in abundance.

Robinson v. *Elliott,* 22 Wall, 513, 525-527;
Russell v. *Winne,* 37 N. Y. 591;
Griswold v. *Sheldon,* 4 N. Y. 581, 590;
Southard v. *Benner,* 72 N. Y. 424;
Zartman v. *First National Bank,* 189 N. Y. 267;
In re Volence, 197 Fed. Rep. 232;
Skilton v. *Codington,* 185 N. Y. 80;
Wood v. *Lowry,* 17 Wend. 492;
Edgell v. *Hart,* 9 N. Y. 213;
Vilas Natl. Bank v. *Newton,* 25 A. D. 62, 66;
Mittnach v. *Kelly,* 3 Abb. Ct. App. Dec. 301;
Gardner v. *McEwen,* 19 N. Y. 123;
In re Marine Construction Co., 144 Fed. 649;
In re Leslie-Judge Co., 272 Fed. Rep. 886;
Worrall v. *Smith,* 1 Camp. 322;
Paget v. *Perchard,* 1 Esp. 205.

And we find in these cases statements of a totally different principle as the basis of the rule here invoked, and one suspectible of no such distinction as the court below drew.

> "If there is an agreement by the mortgagee that the mortgagor may sell or dispose of any of the property for his own benefit, it is established, conclusively, that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any real interest in such property. It is evident that, as to such property, the mortgagee not having any real interest therein, such real interest remains in the mort-

> gagor. Why, then, is the mortgage given upon such property? Evidently the better to enable the mortgagor to enjoy the benefit thereof, at the expense of creditors. Were there no creditors of the mortgagor, there would be no object in giving or taking mortgages accompanied with such an agreement. It is, I think, clear that such an agreement shows that the mortgage was not made in good faith and without a design to hinder creditors. There is no question of intention to be submitted to a jury. It already appears that, as to such property, the mortgage was not designed by the parties as an operative instrument between them; and its only operation must be to the prejudice of others. The court should as to such property, pronounce it void, for the reason that the evidence conclusively shows it fraudulent."
>
> *Russell v. Winne,* 37 N. Y. 591, 594-595.

This, we believe, states the real principle back of the rule we have invoked. It leaves no room for any such distinctions as the judges below drew between tangible and intangible property. Sheltering intangible property for the debtor, enabling him to dispose of it, is just as fraudulent and just as prejudicial as the like duplicity with regard to tangible property.

The leading case is *Robinson* v. *Elliott,* 22 Wall. 513.

As we read the opinion in that case this Court there declared the mortgage in question void on two independent grounds, the first, the fraudulent appearance of ownership, the second, expressly pointed out by the words "apart from this" as a wholly independent ground, that the

mortgage permitted the mortgagors under cover of the mortgage to fend off creditors from seizing the property and at the same time to sell the goods and appropriate the proceeds as their own.

We may be permitted to quote two extensive passages from the opinion, as they seem to us to have been misconstrued by the Court below.

At page 523 this Court said:

> "If chattel mortgages were formerly, in most of the States, treated as invalid unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing (the cases to the contrary being exceptional) conceded the right to the mortgagor to retain possession, if the transaction is on good consideration and bona fide. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make bona fide mortgages of it, to secure creditors, without any actual change of possession.
>
> *"But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract."*

And at pages 525-526 this Court added:

"Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion.

But, ***apart from this,*** *security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.*

In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien.

Whatever may have been the motive, which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument

> *on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose."*
>
> *Robinson* v. *Elliott,* 22 Wall. 513, 523, 525-526.

We find nothing in the case that intimates that appearance of ownership growing out of visible possession is necessary to give to such an arrangement the effect to delay creditors, rendering it fraudulent.

The only other case that seems to call for attention is the decision in *Stackhouse* vs. *Holden,* 66 A. D. 423 a three to two decision in the Appellate Division of the Fourth Department of the State of New York. That Court is, of course, an intermediate Court of Appeal and the decision cannot be regarded as settling the law for the State of New York in conflict with the cases in the Court of Appeals which we have cited. We call attention to the dissent of Justices Spring and Adams, and to the vigorous statement in the dissenting opinion, following exactly the lines of the decision in this Court in *Robinson* vs. *Elliott.*

> "The vice here is that there was in fact no real transfer, no real vesting of title in the assignee. It was an arrangement whereby the title and authority of Humphrey & Holdridge were to be unrestricted as long as they were able to shunt along their business, but whenever the inevitable cash came, then by some sort of legerdermain the written instrument was to be stimulated into life to prefer the overdraft of the defendant. *A transfer which at one time places no bar to the ownership of the assignor, and in another exigency*

is intended to be absolute, cannot be upheld against the creditors who are seeking an equal distribution of all the assets of the bankrupt assignors."

Stackhouse v. *Holden,* 66 A. D. 423, 433.

POINT II.

The decisions in *Sexton* v. *Kessler*, 225 U. S. 90, and in *Chapman* v. *Hunt*, 254 Fed. Rep. 768, in no way conflict with the rule we invoked.

The Circuit Court of Appeals agreed with us that the situation presented in those cases differed in principle from the situation presented here.

In *Sexton* v. *Kessler,* 225 U. S. 90, there was no such feature as exists here of allowing the pledgor to withdraw pledged securities, without substituting therefor other securities of equal or greater value, not previously included in the pledge.

This Court expressly distinguished from that case two New York cases holding that security would fail where the mortgagor retained full power to replace or not as he saw fit, and pointed out that the case before it "was a more limited "and cautious dealing giving an absolute present "right, qualified only by possible substitution and "perhaps by a right of partial withdrawal if the "remaining securties had risen sufficiently in "value" (225 U. S. 98).

In the case at bar every receivable might have been collected and the proceeds used without any new receivable arising.

Moreover, if any new receivable did arise and were assigned it would not be a substitution or a new consideration, for it was to be included on its own account by the very terms of the instrument, irrespective of any collections having been made. Nor was there even any agreement to keep the receivables up to an amount equal to the original amount.

The other case, *Chapman* v. *Hunt,* 254 Fed. Rep. 768, likewise contained the vital feature that only certain specific accounts of limited amount were assigned to Hunt as collateral, and the Candy Works was permitted to receive the proceeds of any such assigned account only "upon assigning "to Hunt an equal amount of new accounts, so "that he should be always secured in the sum of "$6,000."

There was there no such situation of a general leave to the assignor to collect and use the proceeds of the assigned receivables irrespective of any replacement or substitution of others therefor, and without new consideration or provision for any new security whatever.

In both the *Sexton* and the *Hunt* cases there was the vital feature of a new consideration for the withdrawal, and neither transaction bore the two faced character of *not* being an assignment when the assignor wanted to use the property, and being one when his creditors wanted to take the property.

Neither case is parallel to the present. Neither case opened the door to the innumerable frauds to which the decision below throws all doors open.

POINT III.

Even were the rule predicated on a false appearance of ownership, the facts here supply the equivalent and more than the equivalent of any false appearance of ownership arising from possession of tangibles. There was the actual appearance of ownership deliberately preserved and sustained, and deliberate concealment of the assignment to avoid the obvious and contemplated consequences of disclosure of the fact of the assignment of all receivables present and future.

In the statement of facts we have called attention to the statements of Ratner to the specific discussion in the original transaction of the purpose that the existence of the assignment should not become known.

Young Ratner, who acted for the Hub Carpet Co. in the transaction, testified:

> "We worked out the best way to secure him without affecting us personally, that is, by not having him collect accounts or anything of that sort" (fol. 104).
>
> "We told him that we would not under any conditions have him make our collections for us, do you see, and one of the stipulations was that we were to collect them" (fol. 108).

And the petitioner Ratner himself testified:

> "They told me they wanted, they could not, it would be kind of compromising themselves, to be giving away the checks, somebody should

collect it and they could not do it; so they said that they could do it providing they made arrangements that they should be able to keep on collecting the checks and everything until I will find it advisable, then I should call it in, *but as long as I do not find it advisable in any way or manner nobody should know about it and they should keep on collecting the checks.*

Q. *And using the money?* A. *And using the money, certainly"* (fols. 141-142, as corrected by stipulation).

The Court needs no information as to the immediate consequences to a business house of having the fact become known that it had assigned all its receivables present and future as collateral. Those consequences these parties deliberately tried to avoid by keeping the assignment secret, and allowing the Hub Carpet Co. to go on collecting its receivables and using the proceeds in its business.

By concealing the assignment they staved off bankrutpcy till three days more than four months after execution of the assignment.

If the item of possession of chattels giving an appearance of ownership is a material one to the rule we have invoked, the deliberate and intentional arrangement that the Hub Carpet Co. should go on collecting its receivables and using them in its business for the express purpose of preventing any information of the assignment leaking out, is its full legal equivalent.

If the constructive representation of continued ownership growing out of continued possession of tangibles furnishes a needed element in the one case, is its place not fully taken by deliberate

concealment of the assignment and continued collection of the receivables by the assignor with the express purpose of conveying the impression that there had been no assignment? Any one can see that the Hub Carpet Co. maintained its credit after May 23rd, 1921, only by the appearance of owning its receivables.

Is there not here the full equivalent of every element of fraud suggested in *Robinson* v. *Elliott*, 22 Wall. 513, and in *Blennerhasset* v. *Sherman*, 105 U. S. 100? And is not this assignment fraudulent and void at Common Law?

POINT IV.

If the assignment was galvanized into actuality by Ratner's taking over the checks as they came in, during the last week before the bankruptcy, that galvanization process went no further than his actual receipts of about $12,000, and the decree for further payment to him of some $18,000 is erroneous. Moreover as to the $12,000 the transaction was preferential.

This feature of the case has not the general importance of the question we present as a ground for the issue of the writ. We mention the fact merely as an additional feature that will be presented if the writ is allowed.

POINT V.

The main question presented is of the utmost importance to the business community and to the administration of the Bankruptcy Act.

If the decision below correctly states the law, the effect on the credit department of every business house is going to be immediate. No credit man can know what reliance to place upon statements of assets and liabilities. They may be subject to all sorts of concealed assignments of the receivables, which notably constitute a most important item of quick assets, on which allowances of credit are based. The decision below opens the door wide for fraud.

As an actual fact under modern business conditions, especially in large cities, where stocks of goods are carried in warehouses and represented only by warehouse-men's receipts, there is just as much appearance of possession and ownership in the case of receivables as there is in the case of tangible property in storage.

No reason is seen why a shelter that is fraudulent as to one kind of property because it is an assignment when the assignor wants it to be an assignment and not an assignment when he doesn't want it to be, is not just as much a fraud as to another kind of property.

> "The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any purpose other

than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor so that creditors are delayed in collection of their debts, a court of equity will not lend its aid to enforce the contract."

Robinson vs. *Elliott,* 22 Wall. 513, 523.

"Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose."

Robinson v. *Elliott,* 22 Wall. 513, 523, 525-526.

The decision below conflicts with those statements of the law.

POINT VI.

The petition should be allowed and the writ be issued.

In view of the great importance to the business community and to the administration of the bankruptcy act of a definite settlement of this question, and of the conflict between the main point of the decision below and the doctrines announced by this Court in *Robinson* v. *Elliott,* 22 Wall. 513, we urge that the case is one where the writ should issue and the point of law definitively determined.

Respectfully submitted,

SELDEN BACON,
Solicitor and Counsel
for Petitioner.

FILED
FEB 14 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 411

WALLACE BENEDICT, as Receiver in Bankruptcy of The Hub Carpet Company,

vs.

AARON RATNER.

(ON WRIT OF CERTIORARI.)

BRIEF FOR WALLACE BENEDICT, AS RECEIVER.

SELDEN BACON,
Counsel for Wallace Benedict as Receiver,
43 Exchange Place,
New York, N. Y.

INDEX.

PAGE

List of Cases ii
Statement of the Case 1
Principal Questions Involved 11
Specifications of Error 12
Brief of the Argument 20

I. A contemporaneous agreement that one who assigns property as security may continue to hold and dispose of the assigned property without accounting for the proceeds to his assignee renders the assignment fraudulent and void as against creditors as well in the case of assignments of receivables as in the case of recorded chattel mortgages 22

II. The decisions in Sexton v. Kessler, 225 U. S. 90 and in Chapman v. Hunt, 254 Fed. 768 do not conflict with Point I. 30

III. The facts at bar showed an intentional preservation of appearance of ownership and concealment of the assignment, more than the equivalent of the casual appearance of ownership of mortgaged chattels growing out of physical possession 32

IV. If the delivery to Ratner of about $12,000 in the week preceding the bankruptcy created a lien it was created only to the extent of the property so delivered to him, and as to that property was preferential... 37

PAGE

V. The main question is of great importance 38

VI. The decrees below should be reversed and decrees entered in favor of the Trustee 40

APPENDIX 41

A. Sec. 66. New York Stock Corporation Law 41

B. Sec. 267. New York Civil Practice Act 42

C. Sec. 230. New York Lien Law..... 43

D. Secs. 30 and 35. New York Personal Property Law (Statute of Frauds) 44

List of Cases Cited.

PAGE

Blennerhasset v. Sherman, 105 U. S. 100; 29, 37

Chapman v. Hunt, 254 Fed. 768; 13, 18, 30, 31

Edgell v. Hart, 9 N. Y. 213.....13, 24

Frost v. Warren, 42 N. Y. 204..... 20

Gardner v. McEwen, 19 N. Y. 123.....20, 24

Grey v. Dockendorff, 231 U. S. 513..... 18

Griswold v. Sheldon, 4 N. Y. 581.....22, 24, 39

Haugen v. Hachmeister, 114 N. Y. 566..... 13

In re Leslie-Judge Co., 272 Fed. 886; 10, 13, 20, 22, 24

In re Volence, 97 Fed. 232.....20, 22, 24

In re Marine Construction Co., 144 Fed. 699 24

Mittnach v. Kelly, 3 Abb. Ct. App. Dec. 301 24

Paget v. Perchard, 1 Esp. 205..... 24

Potts v. Hart, 99 N. Y. 168..... 13

Robinson v. Elliott, 22 Wall. 513; 10, 12, 20, 22, 23, 24, 25, 26, 27, 28, 29, 37, 39

Russell v. Winne, 37 N. Y. 591; 8, 10, 13, 20, 22, 24, 25, 29, 39

Sexton v. Kessler, 225 U. S. 90.....13, 18, 30

Skilton v. Codington, 185 N. Y. 80; 12, 13, 20, 22, 24, 29, 39

Southard v. Benner, 72 N. Y. 424; 22, 24, 29, 39

Stackhouse v. Holden, 66 A. D. 423; 19, 28, 29, 33

PAGE

Vilas Bank v. Newton, 25 A. D. 62..... 24

Wood v. Lowry, 17 Wend. 492..... 24

Worrall v. Smith, 1 Camp. 322..... 24

Zartman v. First Nat'l Bank, 189 N. Y. 267, 20, 22, 24

Statutes Printed in Appendix.

New York Civil Practice Act, Sec. 267..... 35

New York Lien Law, Sec. 230..... 23

New York Personal Property Law, Secs. 30 and 35 25

New York Stock Corporation Law, Sec. 66.. 9

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 400.

WALLACE BENEDICT, as Receiver in Bankruptcy of The Hub Carpet Company, vs. AARON RATNER.	On Writ of Certiorari.

BRIEF FOR WALLACE BENEDICT AS RECEIVER AND TRUSTEE IN BANKRUPTCY.

Statement of the Case.

This case comes here by writ of certiorari, issued by this Court on application of Mr. Benedict, to review an affirmance by the Circuit Court of Appeals for the Second Circuit of a decree of the District Court for the Southern District of New York, entered on a petition of Aaron Ratner, directing Mr. Benedict as Receiver in Bankruptcy to account to the petitioner Ratner for all sums collected by the Receiver upon any accounts receivable belonging to the bankrupt corporation mentioned in lists transmitted to Ratner, and directing the bankrupt, or the Trustee in Bankruptcy to execute a formal assignment of the balance of any and all such accounts to Ratner to

the extent of the unpaid advances made by Ratner to the bankrupt and interest thereon; and denying the cross-petition of the Receiver for an order that Ratner pay over to the Receiver the sums received by him on such receivables during the ten days next preceding the filing of the petition in bankruptcy and appointment of the Receiver (Record, pp. 77-78).

The decision on both petition and cross-petition hinged on the validity of a single instrument.

The bankrupt corporation, the Hub Carpet Co., was a family affair, the stockholders including only Albert Lifson, his son Edward A. Lifson, and his two sons-in-law, Fieldman and Abner Ratner (p. 8).

Abner Ratner, who was vice-president of the corporation, and who conducted on its part (pp. 21-27) the arrangements made with the petitioner, Aaron Ratner, which are under review, was Aaron Ratner's son (p. 25).

In May, 1921, Aaron Ratner held a note of the bankrupt for $15,000 which was about to mature (pp. 19, 26). The bankrupt desired to turn this into a more or less permanent loan and to increase the loan, as needed, up to $30,000 (p. 19).

An arrangement was thereupon entered into for executing an assignment of all receivables of the corporation, existing and future, to Ratner as security, for his advances, but with the proviso that, until Ratner should demand payment over to him, the corporation should continue to collect the receivables so assigned in its own name, and use the proceeds in its business, as collected, and for its own purposes, and for keeping the entire transaction hidden.

A document of this general character was accordingly executed and delivered to Aaron Ratner. The instrument was purposely kept secret, and, with Aaron Ratner's consent, the bankrupt corporation went on collecting its receivables and using the proceeds for its own purposes, until about a week prior to the filing of the petition in bankruptcy.

A more detailed story of the situation is as follows:

Under date of May 23rd, 1921, there appears on the corporate (loose leaf) minutes a resolution that the officers were authorized to enter into a written contract to borrow not over $30,000 from Aaron Ratner on the notes of the Company and as security to execute and deliver to Aaron Ratner *"an assignment of the books of account of the Company"* (pp. 10-11).

These minutes bear date just four months and three days before the bankruptcy.

An assignment was produced by Mr. Ratner, unacknowledged, but dated May 23rd, 1921, which is set forth at pages 5-6 of the record.

This instrument purports to assign to Aaron Ratner as collateral security for any sums of money he shall loan to the Company, from time to time, in pursuance of the agreement,

> "all sums of money, accounts and demands "due and owing to us on our books of ac- "count, and such moneys, accounts and de- "mands that will become due and owing to "us, including our books of account, which "may accrue and become due to us in the "future in the ordinary course of business" (p. 5).

and the instrument proceeds to make Aaron Ratner the Company's attorney in fact to collect, sue for or compound these (p. 5).

There follow two paragraphs of the instrument which broadly suggest the contemporaneous arrangement, which constitutes the crux of this case.

The two paragraphs are as follows:

> "We, the Hub Carpet Company, further "covenant and agree to fully disclose our "business and financial conditions at any "time the said Aaron Ratner so demands, "and hereby authorize him to enforce this "assignment at any time that in his judg- "ment it may be for his interest to do so, not- "withstanding the time for the payment of "the notes has not in fact accrued.
>
> "We further covenant and agree with the "said Aaron Ratner on demand to turn over "to the said Aaron Ratner any and all pay- "ments made to us by our debtors and to be "applied by him in payment of any obliga- "tions due him, notwithstanding that the time "for payment of said obligations held by him "at that time has not in fact become due "and payable" (p. 6).

It was admitted by all the parties to that transaction that there was, at the time that instrument was given, a clear and definite oral agreement that the Hub Carpet Company was to go on and collect its receivables and continue to use the proceeds in its own business just as if no assignment had been made, until Mr. Ratner should become disturbed about recovering his claim, and that the receivables should be turned over to him only when he made demand that this should be done (pp. 4, 7-8, 13-14, 15-16, 16-17, 19-21, 22, 23, 27, 29, 30). These are the declara-

tions and testimony of both Ratners, of Fieldman and of young Lifson.

In addition the arrangement that the Hub Carpet Company should go on collecting its receivables and using the proceeds without accounting to Mr. Ratner therefor, was most emphatically carried out (pp. 10, 16, 21, 23, 31).

In May the receivables were between $100,000 and $120,000 (p. 29) and a list of them was handed to Mr. Ratner. Similar lists were handed him monthly, showing changes in the accounts, collections by the Hub Carpet Co. and new receivables (pp. 21, 28-29, 31). The last list, of September 23d, 1921, showed only $89,505.44 of receivables (p. 30).

The changes had been very marked. Between May 24th and September 15th, 1921, the Hub Carpet Company had collected on its receivables, and applied to its own use, over $150,000 (p. 10) or more than five times the amount of Ratner's loan, and all out of accounts claimed as so assigned (or agreed to be assigned), to him. The amount so collected thus largely exceeded the total amount of receivables in existence at the time the document is claimed to have been executed.

Aaron Ratner asserted that he had destroyed all lists sent him prior to that of September 23rd, 1921 (p. 29); and there is nothing in the record to show that any bill or account receivable still outstanding on September 17th, 1921, had any existence on May 23rd, 1921.

As to Ratner's loan, it appeared that the Company owed him $15,000 on a note at the time of executing the assignment of May 23rd, that he took a series of renewal notes for that $15,000 and that in July, 1921, he loaned the Company $15,000

additional, making a total of $30,000 (pp. 19-20, 46, 49).

Up to September 17th, 1921, Aaron Ratner was, as he admitted (pp. 20-21, 23, 27, 31), perfectly aware that the Hub Carpet Co. was collecting its receivables and using the money without accounting to him for it. He made no objection thereto (pp. 16, 20-21, 23, 27, 31). He knew they were selling goods, creating new receivables, and collecting old ones, and buying new merchandise. He knew this, he testified (on examination under Section 21-a) "because that was understood in the agreement" (p. 31) and was necessarily notified of it by the varying lists of receivables sent him (p. 31).

Until September 17th, 1921, Ratner made no move to have any of the receivables or their proceeds turned over to him (pp. 18-19, 20-21, 23, 27, 31, 37).

At that time heavy creditors were holding meetings and pressing the bankrupt for payment (pp. 9, 18-19). Aaron Ratner learned of these things on or before September 17th, 1921, from his son (p. 19). He, however, says he did not infer insolvency from the situation, but only "a difficult period because of slow collections or slow turn-over" (pp. 36-37). Nevertheless, he felt he wanted to put his security in force and went to the officers of the Company on September 17th, 1921, and they agreed to turn over to him the checks that would come in (p. 37). They had already banked their receipts of September 17th (p. 19), but beginning with September 19th, 1921, turned over to Aaron Ratner all their subsequent receipts of checks and notes (pp. 18, 22, 31, 33-34) until bankruptcy supervened just one week later, on September 26th, 1921 (p. 4).

During that week Aaron Ratner received from the Hub Carpet Co. checks and notes aggregating $13,928.12 on which he had already realized $11,581.75 of cash (pp. 33-34).

We call particular attention to three items of testimony given by the two Ratners, showing that there was also deliberate and intentional concealment by both Aaron Ratner and the Hub Carpet Co. of this assignment of receivables.

The son, Abner Ratner, who, on behalf of the bankrupt, made the arrangements for the assignment to his father, testified:

> "We worked out the best way to secure him "without affecting us personally, that is by "not having him collect accounts or anything "of that sort" (p. 19).

and again:

> "We told him that we would not under "any conditions have him make our collec- "tions for us, do you see, and one of the "stipulations was that we were to collect "them" (p. 20).

And Aaron Ratner testified:

> "They told me they wanted, they could "not, it would be kind of compromising them- "selves to be giving away the checks, some- "body *should* collect it, and they could not "do it, so they said they could do it, pro- "viding they made arrangements that they "should be able to keep on collecting the "checks and everything until I will find it "advisable, then I should call it in but as "long as I do not find it advisable in any "way or manner, *nobody should know about "it and they should keep on collecting the "checks.*

"Q. And using the money? A. And using "the money, certainly" (p. 27, as corrected by stipulation, p. 54).

It seems clear that if it becomes known that a business house has assigned all its present and future receivables, the result on the credit of the house is prompt and unmistakable. There is no suggestion that either Aaron Ratner of the corporation ever notified any of the debtors that their accounts had been assigned to Ratner. On the contrary the payments continue coming direct to the Company even after September 17th, 1921, and it merely endorses the checks over to Ratner. The matter was intentionally kept concealed from the Bankrupt's creditors (pp. 19-20, 27). The Company thus actually enjoyed the appearance of owning these accounts, and that it should do so was, admittedly, the deliberate intention of both assignor and assignee.

If the rule in *Russell* v. *Winne*, 37 N. Y. 591, were based on appearance of ownership, there was thus here the full equivalent of any appearance of ownership that could grow out of the possession of chattels; *a fortiori* more than the full equivalent of any appearance of ownership that could grow out of the possession of chattels with a chattel mortgage on them of record.

We have thus a deliberately secret assignment of the receivables of the corporation, present and future, as collateral security, not communicated to the debtors or to the creditors of the assignor, but deliberately concealed from the latter, with an agreement that the assignor should remain in apparent ownership of the receivables and collect and use the proceeds for its own benefit and

without accounting to the assignee therefor, until he should conclude that he was insecure. That arrangement is put in operation and the assignor, before the assignee attempts to secure any of the proceeds, collects out of these assigned receivables, and appropriates to its own use, with the assignee's consent, more than five times the full amount of the assignee's claim.

In addition it appears that the family generally had been active just before the bankruptcy in making preferential transfers to themselves of assets which really belonged to the creditors, forbidden by the law of New York. (Stock Corporation Law, Sec. 66; Vide Appendix A.) The prevalent intent to prefer the family to the general creditors of the bankrupt is obvious (pp. 8-9, 11, 14-15, 23-24).

The petition in bankruptcy was filed and the Receiver appointed, on September 26th, 1921 (pp. 4, 6). On the same day a few hours after the Receiver's taking possession of the bankrupt's store, Abner Ratner handed him a copy of the assignment of the accounts to Aaron Ratner, and later in the day Aaron Ratner came in and admitted the contemporaneous arrangement for the corporation's collecting and using the proceeds of the receivables just as if no assignment had been made, and that this had been done until September 17th, 1921 (pp. 7, 13-14).

Mr. Aaron Ratner, asserting the validity of his assignment, demanded that the receivables be turned over to him by the Receiver (p. 4). The Receiver, deeming the assignment void, demanded that Mr. Ratner surrender to the Receiver, as property of the bankrupt, the moneys and notes received by him under it during the week preceding the bankruptcy (p. 10).

Mr. Aaron Ratner, thereupon instituted the present proceeding on application by petition and order to show cause why the Receiver should not be required to account for what he had already collected and why the accounts should not be formally assigned to Ratner (pp. 3-6).

The Receiver showed cause and cross-petitioned that Ratner be required to turn over to the Receiver what he had received under the assignment during the week preceding the bankruptcy (p. 10).

The District Court and the Circuit Court of Appeals have each held the assignment valid, and that the principle—established by this Court (in *Robinson* v. *Elliott*, 22 Wall, 513), by the New York Court of Appeals (in *Russell* v. *Winne*, 37 N. Y. 591, and many other cases), and by the Circuit Court of Appeals for the Second Circuit (in *In re Leslie-Judge Co.*, 272 Fed. Rep. 886, and many other cases)—that provisions that a chattel mortgagor might, despite the mortgage, go on and sell the mortgaged chattels, and use the proceeds without accounting to the mortgagee therefor, rendered such a chattel mortgage fraudulent and void, was predicated exclusively on the apparent ownership flowing from physical possession of the mortgaged chattels and had no application to assignments of accounts receivable, as to which there could be no such physical possession (pp. 42-44, 55-60).

In accordance with this doctrine, the District Court denied the cross application of the Receiver and ordered him to account to Ratner, for what the Receiver had collected, to the extent of Ratner's claim (p. 45). The Circuit Court of Appeals affirmed this decree (p. 60), on the same theory (pp. 55-60). And its decision is now here for review.

The Hub Carpet Company was adjudicated a bankrupt on October 17th, 1921 (p. 7), and a few days after the entry of the District Court's decree on November 19th, 1921, Mr. Benedict, as appears by the petition for certiorari, became the trustee in bankruptcy as well as Receiver.

The Circuit Court of Appeals, to obviate the objection that the decree of the District Court directed the trustee in bankruptcy who was not, *as such*, a party to the proceeding, to assign the receivables to Ratner (Vide Assignment of Error No. 34, p. 49) treated the Receiver as holding his admitted subsequent capacity as trustee (p. 56). But as the decree directed him as Receiver to account to Ratner for his collections and he had prior to the hearing in the District Court already collected over $18,000, his rights as Receiver are still involved.

Principal Questions Presented.

There is but one principal question presented on this writ, namely:

The doctrine is familiar and well established, both in the Federal Courts and in those of New York that a chattel mortgage, which, either by provision incorporated in the instrument, or by contemporaneous arrangement collateral thereto, is affected by an arrangement that the mortgagor may dispose of the property free from the mortgage and use the proceeds for his own purpose without accounting therefor to the mortgagee, is fraudulent and void as against creditors, even though recorded.

Does that doctrine apply to assignments of accounts receivable? Or is that rule restricted to mortgages or assignments of chattels which are

the subject of manual possession, and without application to assignments of accounts receivable or other choses in action not subject to manual possession?

All other questions presented are merely subordinate elements of this question, brought up as parts of the argument of this one question.

Specifications of Error.

1. The District Court erred in directing the Receiver to account to the petitioner Aaron Ratner for all sums received by him upon any accounts contained in the lists transmitted to Ratner.

2. The District Court erred in directing that the bankrupt or its trustee execute a formal assignment of the balances of such accounts to said Ratner up to the extent of his advances.

3. The District Court erred in sustaining the assignment to Ratner alleged in the petition as a valid instrument.

4. The District Court erred in holding that the assignment to Ratner alleged in the petition was free from fraud.

5. The District Court erred in holding that if the agreement had been that the bankrupt should always substitute assigned accounts up to the value of those in existence on May 23, 1921, the security would have been valid.

6. The District Court erred in holding that the decision in *Robinson* v. *Elliott,* 22 Wallace, 513, rested upon the doctrine of imputed ownership.

7. The District Court erred in holding that the principle of imputed ownership is that on which rests the decision in *Skilton* v. *Codington*, 185 N. Y. 80.

8. The District Court erred in holding that the New York Courts have not definitely declared the basis of their rule that agreements permitting a mortgagor to sell the mortgaged property and apply the proceeds to his own use under the mortgage were fraudulent and void as against creditors.

9. The District Court erred in holding that the rules established by the decisions in *Russell* v. *Winne*, 37 N. Y. 591, *Edgell* v. *Hart*, 9 N. Y. 213, *Potts* v. *Hart*, 99 N. Y. 168, *Haugen* v. *Hachmeister*, 114 N. Y. 566. *Skilton* v. *Codington*, 185 N. Y. 80, *In re Leslie-Judge Co.*, 272 Fed. Rep. 886, and other cases as to the result on a mortgage of allowing the mortgagor, under cover of the mortgage to dispose of the mortgaged property and appropriate the proceeds for its own purposes, were limited in their application to cases of tangible property, and had no application to assigned accounts.

10. The District Court erred in holding that the case of *Sexton* v. *Kessler* could not have been decided as it was except that the property was not chattels.

11. The District Court erred in holding that the case of *Chapman* v. *Hunt* could not have been decided as it was except that the property was not chattels.

12. The District Court erred in holding that the doctrine that allowing the mortgagor under cover of the mortgage to dispose of the mortgaged property and appropriate the proceeds for its own purposes is a fraud and renders the mortgage void depends only upon reputed ownership.

13. The District Court erred in holding that the absence of a provision that the assigned accounts should be kept at a given amount could make no difference.

14. The District Court erred in holding that the assignment of the accounts to the petitioner Ratner set up in the petition was valid as the parties meant it.

15. The District Court erred in holding that the security of such an assignment floats as little when the security is diminished as when it is kept good.

16. The District Court erred in holding that the diminution of the security by the mortgagor's appropriating the proceeds of the mortgaged property to its own use by agreement with the lender contemporaneous with the mortgage is a matter merely between the lender and the borrower.

17. The District Court erred in holding that the monthly transmission to Ratner of lists of existing accounts receivable was an identification of the property assigned.

18. The District Court erred in holding that it did not matter whether the assigned accounts were always to be kept at a given figure.

19. The District Court erred in holding that the monthly transmission of a list of specified accounts to Ratner was the equivalent of a formal assignment of the accounts contained in the list.

20. The District Court erred in holding that there is no local or general law that takes from the transaction the effect it was intended to produce.

21. The District Court erred in failing to hold that the assignment of the accounts to Ratner alleged in the petition was affected by a contemporaneous agreement between the parties thereto that the Hub Carpet Company might collect its receivables, the subject of such assignments, and apply the proceeds to its own use, until such time as the petitioner Ratner should demand turning over the same to him.

22. The District Court erred in failing to hold that said Ratner made no such demand until the 17th day of September, 1921, and that in the meantime the Hub Carpet Company had, after the execution of such assignment, with the consent of said Ratner, collected on such receivables so assigned to him by the instrument in question and applied to its own use over $150,000, being more than four times as much as the total amount of said Ratner's claim.

23. The District Court erred in failing to hold that the Hub Carpet Co. in making the assignment to Aaron Ratner and said Ratner in receiving the same intentionally concealed the same from the persons to whom the Carpet Co. was indebteded.

24. The District Court erred in failing to hold that the arrangement between the Hub Carpet Co. and the petitioner Ratner for subsequent collection of its receivables by the Hub Carpet Co. and its use of the proceeds in its own business was intended by them both, among other purposes, to conceal the assignment from the creditors of the Hub Carpet Co. until said Ratner should demand that such receivables be turned over to him.

25. The District Court erred in failing to hold the assignment of accounts from the bankrupt to Ratner fraudulent and void.

26. The District Court erred in failing to hold that such arrangement for collection of assigned receivables by the Hub Carpet Company and application of the proceeds to its own use made the assignment fraudulent and void as to the creditors of said Hub Carpet Company and this receiver.

27. The District Court erred in failing to hold that by his allowing the Hub Carpet Company to collect and apply to its own use proceeds of the assigned receivables in excess of the total amount of his claim said Ratner had waived and abandoned all right to other receivables under such assignment of the accounts receivable.

28. The District Court erred in failng to hold that in so far as it held the transmissions of lists of accounts and bills receivable in the months of July, August and September, 1921, amounted to assignments of such receivables they were preferential, given to secure antecedent indebtedness, and void as preferential under the four months' rule.

29. The District Court erred in failing to hold that in so far as it held the transmission of a list of accounts and bills receivable in the month of June, 1921, amounted to an assignment of such receivables, it was, as to all then pre-existing indebtedness to said Ratner given to secure antecedent indebtedness and void as preferential under the four months' rule.

30. The District Court erred in refusing to hold that the rule that provisions, contained in or governing any transfer of property as security, that the debtor may dispose of the assigned property and apply the proceeds thereof to his own use, without accounting to the creditor therefor, operate in the most effectual manner to ward off other creditors, and render the transfer fraudulent, and this irrespective of whether the character of the property transferred be tangible or intangible.

31. The District Court erred in refusing to order the said Ratner to return to the Receiver all cash, checks and bills receivable belonging to the Hub Carpet Company received by said Ratner between September 16th and 27th, 1921, by virtue of the assignment set forth in the papers on which the petition and cross-petition of the Receiver were heard.

32. The District Court erred in failing to dismiss on the merits the petition of said Ratner.

33. The District Court erred in denying the cross-petition of the Receiver.

34. The Circuit Court of Appeals erred in affirming the decision of the District Court.

35. The Circuit Court of Appeals erred in holding that there was nothing in the record to warrant even a suggestion of fraud.

36. The Circuit Court of Appeals erred in holding that there was nothing further nor better which could have been done by the parties to perfect Ratner's lien or to reduce to possession what the parties had called the collateral security, than the delivery of a list of the accounts to Ratner.

37. The Circuit Court of Appeals erred in holding that the American doctrine of reputed ownership does not apply to choses in action.

38. The Circuit Court of Appeals erred in holding that it is matter of common knowledge that the merchant utilizes his accounts receivable and other kinds of choses in action to keep his business liquid, and every one expects that he may sell or pledge such choses in action for that very purpose.

39. The Circuit Court of Appeals erred in holding that it is mainly because of commercial usages and necessities that the courts have not included accounts receivable within the doctrine of ostensible ownership, but on the contrary have excluded them therefrom.

40. The Circuit Court of Appeals erred in holding that underlying such cases as the decisions of this Court in *Sexton* v. *Kessler,* 225 U. S. 90, and *Grey* v. *Dockendorff,* 231 U. S. 513, and the decision in *Chapman* v. *Hunt,* 254 Fed. Rep.

768, is the principle of exclusion from the reputed ownership rule.

41. The Circuit Court of Appeals erred in holding that the principle of exclusion from the rule was applicable to this case.

42. The Circuit Court of Appeals erred in holding that the principles stated in the opinion of Nash, J., in *Stackhouse* v. *Holden,* 66 App. Div. 423, were applicable to the case at bar.

43. The Circuit Court of Appeals erred in holding that the Receiver (now Trustee) must account and pay over to Ratner any and all proceeds representing collections by the Receiver or Trustee of the debts set forth in the list of September 23, 1921, and on all prior lists up to an amount sufficient to pay the balance beyond $11,581.78, with appropriate interest.

44. The Circuit Court of Appeals erred in holding that the decree of the District Court properly provided that the bankrupt or its Trustee should execute a formal assignment to Aaron Ratner of the accounts not yet collected.

45. The Circuit Court of Appeals erred in directing that the decree of the District Court be affirmed.

Brief of the Argument.

The question presented by this case is an extremely simple one based on facts practically undisputed and is this:

The rule is well established, both in the Federal Courts and in the Courts of the State of New York, that a chattel mortgage, containing a provision that the mortgagor may dispose of the property and use the proceeds for his own purposes, without accounting to the mortgagee, is fraudulent and void as against creditors, even though it be recorded.

> *Robinson* v. *Elliott,* 22 Wall. 513;
> *In re Leslie Judge Co.,* 272 Fed. Rep. 886;
> *In re Volence,* 197 Fed. Rep. 232;
> *Russell* v. *Winne,* 37 N. Y. 591;
> *Skilton* v. *Codington,* 185 N. Y. 80, 90;
> *Zartman* v. *First National Bank,* 189 N. Y. 267.

The principle applies equally whether the provision be incorporated in the instrument or collateral thereto.

> *Frost* v. *Warren,* 42 N. Y. 204;
> *Gardner* v. *McEwen,* 19 N. Y. 123.

Does this doctrine apply exclusively to the case of mortgages of tangible property, the subject of manual possession, left in the possesion of the owner, or will it apply also to the assignment exclusively of receivables, present and future, for purposes of collateral security?

The Courts below have acted that the rule is predicated on the appearance of ownership flowing from physical possession, and that there can be no such appearance of ownership flowing from

possession in the case of receivables, because they are not the subject of manual possession.

The evidentiary facts were undisputed and the question is practically one of law.

The resultant rule adopted by the Courts below, is of the most widespread interest in the commercial world. We believe it to be in flat contradiction of the doctrines announced by this Court in *Robinson* v. *Elliott,* where, in stating that principle, this Court apparently did not derive it from any matter of appearance of possession, but from the inherent duplicity of such an instrument, valid as a mortgage against the mortgagor's creditors when the debtor wants it to be, and of no validity when he wants to use the proceeds himself; and we understand the decisions of the New York Court of Appeals to hold that same doctrine.

The District Court, as we have seen, took an opposite view, holding that the assignment was not fraudulent but valid, on the ground that the rule, that such arrangements are fraudulent and void as against creditors, is predicated exclusively on appearance of ownership flowing from physical possession of the property (pp. 42-44) and directed the receiver and trustee to turn over the receivables to the claimant, Mr. Ratner, to an amount sufficient to satisfy his claim, sustaining that claim as a prior lien (p. 45).

That decision was unanimously affirmed by the Circuit Court of Appeals on the same ground (pp. 55-60); the court holding that though the agreement would have rendered the assignment void had it been one of tangible property, it had no such effect on an assignment of receivables not susceptible of manual possession.

POINT I.

A contemporaneous agreement that despite an assignment of property as collateral security to secure the assignee for a debt due him from the assignor, the assignor may continue to use and dispose of the property as his own, retaining and using the proceeds in his business, without accounting therefor in any way to his assignee, renders the assignment fraudulent and void as against creditors, not only in the case of ordinary chattel mortgages but also in the case of assignments confined to accounts receivable.

In re Leslie-Judge Co., 272 Fed. Rep. 886;
Russell v. *Winne*, 37 N. Y. 591;
Skilton v. *Codington*, 185 N. Y. 80, 90-92;
Griswold v. *Sheldon*, 4 N. Y. 581, 588-590;
Southard v. *Benner*, 72 N. Y. 424, 431;
Zartman v. *First Natl. Bank*, 189 N. Y. 267;
In re Volence, 197 Fed. Rep. 232;
Robinson v. *Elliot*, 22 Wall, 513, 525, 527.

We think an examination of these cases, and others, shows clearly that the basic principle of this rule is not predicated on any appearance of ownership of the property growing out of its

possession in the case of receivables, because they are not the subject of manual possession.

The evidentiary facts were undisputed and the question is practically one of law.

The resultant rule adopted by the Courts below, is of the most widespread interest in the commercial world. We believe it to be in flat contradiction of the doctrines announced by this Court in *Robinson* v. *Elliott,* where, in stating that principle, this Court apparently did not derive it from any matter of appearance of possession, but from the inherent duplicity of such an instrument, valid as a mortgage against the mortgagor's creditors when the debtor wants it to be, and of no validity when he wants to use the proceeds himself; and we understand the decisions of the New York Court of Appeals to hold that same doctrine.

The District Court, as we have seen, took an opposite view, holding that the assignment was not fraudulent but valid, on the ground that the rule, that such arrangements are fraudulent and void as against creditors, is predicated exclusively on appearance of ownership flowing from physical possession of the property (pp. 42-44) and directed the receiver and trustee to turn over the receivables to the claimant, Mr. Ratner, to an amount sufficient to satisfy his claim, sustaining that claim as a prior lien (p. 45).

That decision was unanimously affirmed by the Circuit Court of Appeals on the same ground (pp. 55-60); the court holding that though the agreement would have rendered the assignment void had it been one of tangible property, it had no such effect on an assignment of receivables not susceptible of manual possession.

POINT I.

A contemporaneous agreement that despite an assignment of property as collateral security to secure the assignee for a debt due him from the assignor, the assignor may continue to use and dispose of the property as his own, retaining and using the proceeds in his business, without accounting therefor in any way to his assignee, renders the assignment fraudulent and void as against creditors, not only in the case of ordinary chattel mortgages but also in the case of assignments confined to accounts receivable.

In re Leslie-Judge Co., 272 Fed. Rep. 886;
Russell v. *Winne*, 37 N. Y. 591;
Skilton v. *Codington*, 185 N. Y. 80, 90-92;
Griswold v. *Sheldon*, 4 N. Y. 581, 588-590;
Southard v. *Benner*, 72 N. Y. 424, 431;
Zartman v. *First Natl. Bank*, 189 N. Y. 267;
In re Volence, 197 Fed. Rep. 232;
Robinson v. *Elliot*, 22 Wall, 513, 525, 527.

We think an examination of these cases, and others, shows clearly that the basic principle of this rule is not predicated on any appearance of ownership of the property growing out of its

physical possession, but on the two-faced character of the instrument, making it a shield of the debtor's property against his other creditors, while leaving it no obstacle to the debtor's using his property as he will; and on the fact that an instrument so qualified is not a real security, but is intended for ulterior and fraudulent purposes and operates in fraud of creditors.

It seems to us that the learned courts below have confused two independent principles, though frequently both apply to a single transaction. There is *one* rule that *is* based on such appearance of ownership growing out of continued possession. It is the familiar one, now limited by statutes, that *unrecorded* chattel morgages are void (in many states only against creditors or purchasers *without notice*) where the mortgagor remains in continued possession. *That* statutory rule unquestionably found its origin in the fact that the mortgagor is clothed by possession with a fallacious appearance of title. And provisions for recording chattel morgages were devised to remove that appearance and to cure that defect by giving notice, while saving the advantages of honest mortgages.

Robinson v. *Elliott*, 22 Wall., 513, 523.

For the New York statute providing for recording chattel mortgages Vide Appendix C.

Decisions holding that such agreements as we are here considering do avoid mortgages, even though they be recorded in accordance with the statute, and even though the mortgagee takes and holds possession of the property, can not rest on any such principle of apparent ownership, growing out of physical possession, for that appearance is prevented by the recording of the instrument,

and must rest on some other and different basic principle, not cured by preventing that appearance.

Cases implying that the rule is not based on any appearance growing out of possession but on the fraudulent character of the arrangement we find in abundance.

Robinson v. *Elliott,* 22 Wall. 513, 525-527;
Russell v. *Winne,* 37 N. Y. 591;
Griswold v. *Sheldon,* 4 N. Y. 581, 590;
Southard v. *Benner,* 72 N. Y. 424;
Zartman v. *First National Bank,* 189 N. Y. 267;
In re Volence, 197 Fed. Rep. 232;
Skilton v. *Codington,* 185 N. Y. 80;
Wood v. *Lowry,* 17 Wend. 492;
Edgell v. *Hart,* 9 N. Y. 213;
Vilas Bank v. *Newton,* 25 A. D. 62, 66;
Mittnach v. *Kelly,* 3 Abb. Ct. App. Dec. 301;
Gardner v. *McEwen,* 19 N. Y. 123;
In re Marine Construction Co., 144 Fed. 649;
In re Leslie-Judge Co., 272 Fed. Rep. 886;
Worrall v. *Smith,* 1 Camp. 322;
Paget v. *Perchard,* 1 Esp. 205.

And we find in many of these cases statements of a totally different principle, as the basis of the rule here invoked—one susceptible of no such distinction as the courts below have drawn.

In the leading New York case it was said:

> *"If there is an agreement by the mortgagee that the mortgagor may sell or dispose*

physical possession, but on the two-faced character of the instrument, making it a shield of the debtor's property against his other creditors, while leaving it no obstacle to the debtor's using his property as he will; and on the fact that an instrument so qualified is not a real security, but is intended for ulterior and fraudulent purposes and operates in fraud of creditors.

It seems to us that the learned courts below have confused two independent principles, though frequently both apply to a single transaction. There is *one* rule that *is* based on such appearance of ownership growing out of continued possession. It is the familiar one, now limited by statutes, that *unrecorded* chattel morgages are void (in many states only against creditors or purchasers *without notice*) where the mortgagor remains in continued possession. *That* statutory rule unquestionably found its origin in the fact that the mortgagor is clothed by possession with a fallacious appearance of title. And provisions for recording chattel morgages were devised to remove that appearance and to cure that defect by giving notice, while saving the advantages of honest mortgages.

Robinson v. *Elliott,* 22 Wall., 513, 523.

For the New York statute providing for recording chattel mortgages Vide Appendix C.

Decisions holding that such agreements as we are here considering do avoid mortgages, even though they be recorded in accordance with the statute, and even though the mortgagee takes and holds possession of the property, can not rest on any such principle of apparent ownership, growing out of physical possession, for that appearance is prevented by the recording of the instrument,

and must rest on some other and different basic principle, not cured by preventing that appearance.

Cases implying that the rule is not based on any appearance growing out of possession but on the fraudulent character of the arrangement we find in abundance.

Robinson v. *Elliott,* 22 Wall. 513, 525-527;
Russell v. *Winne,* 37 N. Y. 591;
Griswold v. *Sheldon,* 4 N. Y. 581, 590;
Southard v. *Benner,* 72 N. Y. 424;
Zartman v. *First National Bank,* 189 N. Y. 267;
In re Volence, 197 Fed. Rep. 232;
Skilton v. *Codington,* 185 N. Y. 80;
Wood v. *Lowry,* 17 Wend. 492;
Edgell v. *Hart,* 9 N. Y. 213;
Vilas Bank v. *Newton,* 25 A. D. 62, 66;
Mittnach v. *Kelly,* 3 Abb. Ct. App. Dec. 301;
Gardner v. *McEwen,* 19 N. Y. 123;
In re Marine Construction Co., 144 Fed. 649;
In re Leslie-Judge Co., 272 Fed. Rep. 886;
Worrall v. *Smith,* 1 Camp. 322;
Paget v. *Perchard,* 1 Esp. 205.

And we find in many of these cases statements of a totally different principle, as the basis of the rule here invoked—one susceptible of no such distinction as the courts below have drawn.

In the leading New York case it was said:

> *"If there is an agreement by the mortgagee that the mortgagor may sell or dispose*

of any of the property for his own benefit, it is established, conclusively, that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any real interest in such property. It is evident that, as to such property, the mortgagee not having any real interest therein, such real interest remains in the mortgagor. Why, then, is the mortgage given upon such property? Evidently the better to enable the mortgagor to enjoy the benefit thereof, at the expense of creditors. Were there no creditors of the mortgagor, there would be no object in giving or taking mortgages accompanied with such an agreement. It is, I think, clear that *such an agreement shows that the mortgage was not made in good faith and without a design to hinder creditors.* There is no question of intention to be submitted to a jury. It already appears that, as to such property, the mortgage was not designed by the parties as an operative instrument between them; and its only operation must be to the prejudice of others. *The court should as to such property, pronounce it void, for the reason that the evidence conclusively shows it fraudulent.*"

Russell v. *Winne*, 37 N. Y. 591, 594-595.
Vide Appendix D for provisions of the New York Statute of Frauds.

This, we believe, states the real principle back of the rule we have invoked. It leaves no room for any such distinctions as the judges below have drawn between tangible and intangible property. Sheltering intangible property for the debtor, enabling him to dispose of it, is just as fraudulent and just as prejudicial as the like duplicity with regard to tangible property.

The leading case in this Court is *Robinson* v. *Elliott*, 22 Wall. 513.

As we read the opinion in that case, this Court there declared the mortgage in question void on *two independent grounds,* the first, the fraudulent appearance of ownership, the second, expressly pointed out by the use of the words "apart from this" as a wholly independent ground, that the mortgage permitted the mortgagors under cover of the mortgage, to fend off creditors from seizing the property and at the same time to sell the goods and appropriate the proceeds as their own.

We may be permitted to quote two extensive passages from the opinion, as the Courts below have given to them a construction entirely opposite, as it seems to us, to what this Court declared in that case.

At page 523 this Court said:

> "If chattel mortgages were formerly, in most of the States, treated as invalid unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing (the cases to the contrary being exceptional) conceded the right to the mortgagor to retain possession, if the transaction is on good consideration and bona fide. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make bona fide mortgages of it, to secure creditors, without any actual change of possession.
>
> *"But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than*

his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract."

And at pages 525-526 this Court added:

"Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and his ownership and possesion had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion.

But, APART FROM THIS, security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.

In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien.

Whatever may have been the motive, which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an

indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose."

Robinson v. *Elliott,* 22 Wall. 513, 523, 525-526.

We find nothing in that case that intimates that appearance of ownership growing out of visible possession is necessary to give to such an arrangement that effect to delay creditors which renders it fraudulent.

The only other case that seems to call for attention is the decision in *Stackhouse* v. *Holden,* 66 A. D. 423, a three to two decision in the Appellate Division of the Fourth Department of the State of New York. That Court is, of course, an intermediate Court of Appeal and the decision cannot be regarded as settling the law for the State of New York, especially when it is in conflict with the cases in the Court of Appeals which we have cited. We call attention to the dissent in *Stackhouse* v. *Holden,* of Justices Spring and Adams, and to the vigorous statement in the dissenting opinion, following exactly the lines of the decision of this Court in *Robinson* v. *Elliott.*

"The vice here is that there was in fact no real transfer, no real vesting of title in the assignee. It was an arrangement whereby the title and authority of Humphrey & Holdridge were to be unrestricted as long as they were able to shunt along their business, but whenever the inevitable crash came, then, by

some sort of legerdemain, the written instrument was to be stimulated into life to prefer the overdraft of the defendant. *A transfer which at one time places no bar to the ownership of the assignor, and in another exigency is intended to be absolute, cannot be upheld against the creditors who are seeking an equal distribution of all the assets of the bankrupt assignors.*"

Stackhouse v. *Holden,* 66 A. D. 423, 433.

The case was not appealed to the Court of Appeals, but, as the writer is informed, was settled by a compromise, after this decision by the Appellate Division.

The last quoted sentence from the opinion of Justice Spring states in other words the principle contended for us, and which we have regarded as announced by this Court in *Robinson* v. *Elliott;* that the fraudulent character of such an agreement, that the mortgagor may continue to sell the property without accounting for the proceeds to the mortgagee, is not derived from any manner or appearance of possession, but from the inherent duplicity of such an instrument, which is valid as a mortgage against his creditors when the debtor wants to shield his property from them, and of no binding force when he wants to use the proceeds himself. The decision in *Stackhouse* v. *Holden,* is in flat conflict with the principles laid down in the following cases:

Robinson v. *Elliott,* 22 Wall. 513;
Blennerhasset v. *Sherman,* 105 U. S. 100;
Russell v. *Winne,* 37 N. Y. 591;
Southard v. *Benner,* 72 N. Y. 424, 431;
Skilton v. *Codington,* 185 N. Y. 80, 90-92.

POINT II.

The decisions in *Sexton* v. *Kessler*, 225 U. S. 90, and in *Chapman* v. *Hunt*, 254 Fed. Rep. 768, in no way conflict with the rule we invoked.

In *Sexton* v. *Kessler*, 225 U. S. 90, there was no such feature as exists here of allowing the pledgor to withdraw pledged securities, without substituting therefor other securities of equal or greater value, not previously included in the pledge.

This Court expressly distinguished from that case two New York cases, holding that the security would fail where the mortgagor retained full power to replace or not as he saw fit, and pointed out that in the case before it there "was a "more limited and cautious dealing giving an abso- "lute present right, qualified only by possible sub- "stitution and perhaps by a right of partial with- "drawal if the remaining securities had risen suf- "ficiently in value" (225 U. S. 98).

In the case at bar every receivable might have been collected and the proceeds used, without any new receivable arising.

Moreover, if any new receivable did arise and were assigned it would not constitute a substitution of new collateral for old, for by the very terms of the instrument it was to be included on its own account, irrespective of any collections having been made. Nor was there even any agreement to keep the receivables up to an amount equal to the original amount.

The other case, *Chapman* v. *Hunt,* 254 Fed. Rep. 768, likewise contained the vital feature that only certain specific accounts of limited amount were assigned to Hunt as collateral, and the Candy Works was permitted to receive the proceeds of any such assigned account only "upon assigning "to Hunt an equal amount of new accounts, so "that he should be always secured in the sum of "$6,000."

There was there no such situation of a general leave to the assignor to collect and use the proceeds of the assigned receivables, irrespective of replacement or substitution of others in their place, and without new consideration or provision for any new substituted security whatever.

In both the *Sexton* and the *Hunt* cases there was the vital feature of a new consideration for the withdrawal, and neither transaction bore the two faced character of *not* being an assignment when the assignor wanted to use the property, and being one when his creditors wanted to take the property.

Neither case is parallel to the present. Neither case opened the door to the innumerable frauds to which the decision below throws all doors open.

POINT III.

Even were the rule predicated on a false appearance of ownership, the facts here supply the equivalent, and more than the equivalent, of any false appearance of ownership arising from possession of tangibles. There was the actual appearance of ownership deliberately preserved and sustained, and deliberate concealment of the assignment to avoid the obvious and contemplated consequences of disclosure of the fact of the assignment of all receivables present and future.

In the statement of facts we have called attention to the testimony of Ratner to the specific discussion, in the original transaction, of the purpose that the existence of the assignment should not become known.

Young Ratner, who acted for the Hub Carpet Co. in the transaction, testified:

> "We worked out the best way to secure him *without affecting us personally,* that is, by not having him collect accounts or anything of that sort" (p. 19).
>
> "We told him that *we would not under any conditions have him make our collections for us,* do you see, and one of the stipulations was that we were to collect them" (p. 20).

And the petitioner Ratner himself testified:

> "They told me they wanted, they could not, it would be kind of compromising themselves, to be giving away the checks, somebody should

collect it and they could not do it; so they said that they could do it providing they made arrangements that they should be able to keep on collecting the checks and everything until I will find it advisable, then I should call it in, *but as long as I do not find it advisable in any way or manner nobody should know about it and they should keep on collecting the checks.*

"Q. And using the money? A. And using the money, certainly" (p. 27 as corrected by stipulation at p. 54).

The Court needs no information as to the immediate consequences to a business house of having the fact become known that it had assigned all its receivables present and future as collateral.

Those consequences these parties deliberately tried to avoid by keeping the assignment secret, allowing the Hub Carpet Co. to go on collecting its receivables and using the proceeds in its business.

It is not to be forgotten that Ratner Senior is here as a plaintiff in equity seeking the affirmative relief of having the accounts turned over to him. He nowhere suggests that there is any entry on the books of the bankrupt of the assignment of the accounts to him. He admits on the contrary that there was here, not only the casual secrecy of a transaction in receivables such as Justice Nash referred to in *Stackhouse* v. *Holden,* 66 A. D. 453, but direct, active concealment, and *expressed* intention on the part of both parties that *"nobody should know about it"* (p. 27). This implies that the assignment was not entered on the books, and that it was intended, by both the bankrupt and Ratner, that the bankrupt should

continue in business as the ostensible owner of its receivables, free from encumbrance, and have continued credit on the standing of that apparent ownership—a fraudulent appearance if the assignment be sustained.

To-day every credit man of a wholesale house examines the statements of a buyer to see what his assets and liabilities are, and the item of bills and accounts receivable is always one of the most important items on which an extension of credit is based. The stock of goods and the receivables are the liquid assets. The merchant of today has quite as much appearance of ownership of his receivables as he has of goods stored in warehouse, and on his appearance of ownership of his receivables he obtains credit quite as much as on his appearance of owning goods which may perhaps be stored in a dozen different public warehouses, and of which his ostensible possession is practically limited to his possession of warehouse receipts.

Mr. Ratner in this case admits that both he and the bankrupt deliberately arranged that nobody should know about it (p. 27) and there is not a suggestion that any one did know about it until after the appointment of the receiver. The debtors of the bankrupt were not notified of the assignment of the claims against them and the bankrupt's creditors were kept in ignorance of it. Even the sums Ratner actually received all came into the physical possession of the bankrupt and even during the last week, when they were turned over by it to Ratner in the form of checks or notes, the collection by the bankrupt was kept up.

The whole situation from start to finish was one of deliberate, active concealment by both Ratner

and the bankrupt, and that active concealment was essentially fraudulent.

There was ostensible ownership by the bankrupt of its receivables and that appearance was deliberately assisted by Ratner.

The Circuit Court of Appeals says:

> "There was nothing further nor better "which could have been done by the parties "to perfect Ratner's lien or to reduce to pos- "session what the parties had called the 'col- "lateral security.'
>
> "There was no way by which Hub Co. could "physically deliver notes, checks or other evi- "dences of debt from customers which had "not yet been received, and the only prac- "ticable method of conferring title and "possession was by the delivery of the list "in compliance with the demand of Septem- "ber 17, as contemplated by the agreement "of May 23" (p. 57).

Neither of these statements appears to us sound.

As to the first of these two paragraphs, we see two things that could have been done, and which the bar has generally regarded as important in such cases.

(1) The transfer of the accounts could have been entered on the account books of the bankrupt.

(2) Notice of the assignment of each claim could have been sent to the debtor requiring him to pay the assignee. Such notices are recognized as important for the purpose of protecting a *bona fide* assignee by the New York statute. (Civil Practice Act, N. Y., Sec. 267, Subd. 1; *Vide* Appendix B).

But either of these steps would have tended to frustrate the purpose of concealment.

As to the second paragraph, had the assignment been unaffected by the special agreement, the first receivables collected would have been turned over to Ratner at once when received. Instead, over $150,000 was collected thereon and used by the bankrupt with Ratner's knowledge and consent.

Physical possession of corporeal property is not the only method of giving an appearance of ownership. The opinions below have assumed the contrary. Even if the doctrine of reputed ownership were applicable, this doctrine should not be restricted to one special form of appearance of ownership, especially where the appearance of reputed ownership has been deliberately and intentionally created and fostered by both the bankrupt and the claimant under a secret transfer, purposely kept concealed.

By concealing the assignment they staved off bankruptcy till three days more than four months after the execution of the assignment.

If possession of chattels giving an appearance of ownership is a material factor of the rule we have invoked, the deliberate and intentional arrangement that the Hub Carpet Co. should go on collecting its receivables and using them in its business for the express purpose of preventing any information of the assignment leaking out, is its full legal equivalent.

If the constructive representation of continued ownership growing out of continued possession of tangibles furnishes a needed element in the one case, is its place not fully taken in the other by deliberate concealment of the assign-

ment and continued collection of the receivables by the assignor with the express purpose of conveying the impression that there had been no assignment? Any one can see that the Hub Carpet Co. maintained its credit after May 23rd, 1921, only by the appearance of owning its receivables.

Is there not here the full equivalent of every element of fraud suggested in *Robinson* v. *Elliott*, 22 Wall. 513, and in *Blennerhasset* v. *Sherman*, 105 U. S. 100? And is not this assignment fraudulent and void at common law?

POINT IV.

If the assignment was galvanized into actuality by Ratner's taking over the checks as they came in, during the last week before the bankruptcy, that galvanization process went no further than his actual receipts of about $12,000, and the decree for further payment to him of some $18,000 is erroneous. Moreover as to the $12,000 the transaction was preferential.

POINT V.

The main question presented is of the utmost importance to the business community and to the administration of the Bankruptcy Act.

If the decision below correctly states the law, the effect on the credit department of every business house is going to be immediate. No credit man can know what reliance to place upon statements of assets and liabilities. They may be subject to all sorts of concealed assignments of the receivables, which notably constitute a most important item of quick assets, on which allowances of credit are based. The decision below opens the door wide for successful fraud.

As an actual fact under modern business conditions, especially in large cities, where stocks of goods are carried in warehouses and represented only by warehousemen's receipts, there is just as much appearance of possession and ownership in the case of receivables as there is in the case of tangible property in storage.

No reason is seen why a shelter that is fraudulent as to one kind of property because it is an assignment when the assignor wants it to be an assignment and not an assignment when he doesn't want it to be, is not just as much a fraud as to another kind of property.

> "The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any purpose other than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor so that creditors are

delayed in collection of their debts, a court of equity will not lend its aid to enforce the contract."

Robinson v. *Elliott,* 22 Wall. 513, 523.

"Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose."

Robinson v. *Elliott,* 22 Wall, 513, 523, 525-526.

The decision below conflicts with those statements of the law, and with the repeated declaration of the law by the New York Court of Appeals.

Russell v. *Winne,* 37 N. Y. 591;
Skilton v. *Codington,* 185 N. Y. 80, 90-92;
Southard v. *Benner,* 72 N. Y. 424, 431;
Griswold v. *Sheldon,* 4 N. Y. 581, 588-591.

The arrangement made in this case had precisely the characteristics described in all these cases as constituting fraud on creditors.

POINT VI.

The decrees under review should be reversed and decree ordered directing that Ratner pay over to Mr. Benedict, as Receiver and Trustee, the sums collected by Ratner on the receivables; and the application by Ratner that the receiver account to him should be denied.

SELDEN BACON,
Counsel for Wallace Benedict
as Receiver and as Trustee.

APPENDIX.

A.

Sec. 66. New York Stock Corporation Law.

Section 66. No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a corporation formed under or subject to the banking law, exceeding in value one thousand dollars, shall be made by such cor-

poration, or by any officer or director thereof, unless authorized by previous resolution of its board of directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation, who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation.

B.

Sec. 267. New York Civil Practice Act.

Sec. 267. Rules respecting the allowance of counterclaims.

The counterclaim, specified in subdivision second of the last section, is subject to the following rules:

1. If the action is founded upon a contract which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto or an assignee of the contract at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned

or transferred it after it became due must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the assignor while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

C.

New York Lien Law, Section 230.

§ 230. Chattel mortgages to be filed. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam-tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article. This article shall not apply to agreements creating liens upon merchandise or the proceeds thereof for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, where the conditions specified in section forty-five of the personal property law are complied with, nor shall this article apply to the mortgage or pledge of or lien upon

stocks or bonds mortgaged or pledged to secure payment of a loan, which stocks or bonds, by the terms of a written instrument creating such mortgage, pledge or lien and setting forth the conditions of such loan, are to be delivered to the lender on the day such loan is made, and every such mortgage, pledge or lien, of such securities, shall be valid as against creditors of such mortgagor or pledgor, provided, however, that if such securities are not delivered to the pledgee or mortgagee on the day such loan is made, the mortgage, lien or pledge therein intended to be created shall be absolutely void and of no effect as against the creditors of such mortgagor, pledgor or lienor unless such instrument, or a true copy thereof, is filed as directed in this article, on the day following the making of such loan, and provided also that every such mortgage, pledge or lien shall be absolutely void as against purchasers, pledgees or mortgagees in good faith of such stocks or bonds provided such stocks or bonds are delivered to such purchaser, pledgee or mortgagee at the time of such purchase, pledge or mortgage.

D.

New York Statute of Frauds.
(Personal Property Law.)

§ 30. Definitions. As used in this article, the term "transfer" includes sale, assignment, conveyance, deed and gift, and the term "agreement" includes promise and undertaking.

§ 35. Transfers and charges with fraudulent intent. Every transfer of any interest in personal property, or the income thereof, and every charge on such property or income, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with such intent, is void as against every person so hindered, delayed or defrauded.

Office Supreme Court, U. S.
FILED
APR 23 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1922.

No. 49 //

WALLACE BENEDICT, as Receiver in Bankruptcy of The Hub Carpet Company,
Appellant,
against
AARON RATNER,
Appellee.
(On Writ of Certiorari.)

BRIEF IN REPLY.

The brief for the Appellee contains but little not covered by the brief for Benedict already filed. We may, however, give brief attention to certain cases which have been cited by the Appellee, apparently in the belief that they bear weighily on the question here presented.

In *Union Trust Co.* v. *Bulkeley*, 150 Fed. 510, it was pointed out by the trustee in bankruptcy that the bankrupt had collected some of the assigned accounts and used the proceeds in his business; but the District Judge specifically pointed out that these acts were "*not* chargeable to the petitioner, nor, so far as the testimony shows, known to or even suspected by him" (150 Fed. 510, 514). The Circuit Court of Appeals made no reference to that feature of that case.

So far from that decision being in point, that statement indicates that it was considered in that case that, had the petitioner there been a party to any such arrangement as is here fully shown to have been directly joined in and fully participated in by the appellee, a totally different case would have been presented for consideration. The case distinguishes itself.

Re Michigan Furniture Co., 249 Fed. 978, is a case decided by the same District Judge (Hon. Learned Hand) before whom the present case originally came.

In *Greey* v. *Dockendorff*, 231 U. S. 513, there was no such arrangement by which the assignor was at liberty to collect and use the proceeds in his business, without paying the loan.

Moreover, in that case, this Court pointed out that "There was no active concealment and no attempt to mislead any one interested to know the truth" (231 U. S. 516). Here on the contrary there was the deliberate arrangement that the assignment must be so arranged and managed that "nobody should know about it" (Record, p. 27, side page 48; vide stipulated correction at page 54, side page 94, b), in addition to the arrangement that the bankrupt might go on, as it did, and collect the secretly assigned accounts, and use the proceeds in its own business (ibidem).

The case of *Sexton* v. *Kessler*, 225 U. S. 90, as has been already pointed out both by us and by the Circuit Court of Appeals (p. 59), is not in point.

In an equity case the whole determination below is, of course, open for review here, both as to the facts and as to the law. And the statement of

the Circuit Court of Appeals that "there is nothing in this record to warrant even a suggestion of fraud" (p. 56) does not conclude this court, especially where the evidentiary facts are admitted and the question is whether admitted acts and concealment constitute fraud.

cf. *Russell* v. *Winne*, 37 N. Y. 591, 594-595;
Frost v. *Warren*, 42 N. Y. 204.

That accounts receivable are not chattels, or within the provisions for record of chattel mortgages, is unquestioned.

On the fundamental point in the case,—that the vice in an assignment of accounts as security which is affected by an arrangement that the assignor may continue to collect the accounts and use the proceeds himself without paying the claim they are assigned to secure, arises from the two-fold character of the instrument, and not from the fact of apparent possession,—the long array of authorities that accounts receivable are not chattels, cited by the appellee, sheds no additional light.

The effect of continued possession of chattels is, under the New York recording act, completely obviated by recording a chattel mortgage. But it remains void none the less though recorded, if it is affected by an arrangement that the mortgagor may sell and use the proceeds in his business, without accounting to the mortgagee.

Zartman v. *First National Bank*, 189 N. Y. 267;
In re Leslie Judge Co., 272 Fed. 886;
Robinson v. *Elliott*, 22 Wall. 513, 521.

Indeed the Zartman case strongly supports in an additional way our theory that the rule (that such agreements that the mortgagor may sell and use the proceeds himself for his own purposes renders a chattel mortgage void) is not predicated on imputed ownership arising out of continued possession of chattels by the mortgagor, as held by the courts below, for it lays down that rule as applicable as well to mortgages of realty as to those of personalty.

Zartman v. *First National Bank,* 189 N. Y. 267.

What special quality is there in accounts receivable that differentiates them from *all* other property even incorporeal hereditaments, when it comes to a question of fraud on creditors?

In the *Leslie Judge* case the Circuit Court of Appeals in New York held that a trust deed (or mortgage) covering both chattels and intangibles was void as to the intangibles as well as to the chattels, because it permitted the mortgagor to sell and use the proceeds of only such of the *chattels* as might become useless as part of its plant.

In re Leslie Judge Co., 272 Fed. 886.
Certiorari refused.
Green v. *Felder,* 256 U. S. 704.

It is not easy on any principlesgoverning *fraud* to distinguish that case from the present one.

An arrangement by which the assignor can go on collecting the assigned accounts and using the proceeds in his business as he pleases, without paying off the claim to secure which the accounts are assigned, as this court pointed out in *Robinson* v. *Elliott* (22 Wall. 513, 521), has a different purpose than mere security, and tends to hinder,

delay and defraud the creditors of the assignor in the collection of their debts. It is intended to be an assignment when creditors seek to realize, and *not* to be one when the bankrupt wants to use the property for his own purposes. That duplicity of intent destroys its good faith and makes it fraudulent.

Robinson v. *Elliott*, 22 Wall. 513, 521;
Russell v. *Winne*, 37 N. Y. 591, 594-595.

So viewed, what difference does it make whether the property so dealt with consists of chattels, or notes, or accounts receivable?

Respectfully submitted,

SELDEN BACON,
Counsel for Appellant.

No. 11

FILED
MAY 29 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1922

No. .....

WALLACE BENEDICT, as Receiver in Bankruptcy of the Hub Carpet Company,

Petitioner,

against

AARON RATNER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOUIS S. POSNER,
Counsel for Respondent,
115 Broadway,
Borough of Manhattan,
New York City.

INDEX OF POINTS.

I.

Ostensible ownership arising from physical possession is the basis of the rule which obtains in some states, including New York, that a reserved right of disposal in a mortgage avoids the pledge of tangible property.

The rules which distinguish between tangible and intangible personal property run markedly through the Common Law and Statutes of England and America; and neither by reason nor authority can the language of the cases cited by petitioner, all of which deal with tangible property, be held to apply to the other. p. 5

II.

The decisions of Federal and State Courts sustain the validity of the instrument under review. p. 13

III.

The taking possession of the assigned accounts prior to the filing of the petition in bankruptcy perfected the lien thereon of the assignee, and the rights of the subsequently appointed Receiver and Trustee became subject thereto. p. 17

IV.

The good faith of the transaction is not open to question. p. 20

V.

No question of public interest is involved; dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be used to procure credit or capital.

p. 23

CONCLUSION

The law is settled in respondent's favor and the petition therefore should be denied.

p. 25

INDEX OF CASES.

PAGE

Ackerman v. True, 175 N. Y. 353..... 22
Bacon v. Bonham, 27 N. J. Eq. 212..... 7
Bailey v. Baker Ice Machine Co., 239 U. S., at pp. 275-276 19
Barnes v. Alexander, 232 U. S. 117..... 17
Boise v. Talcott, 212 Fed. Rep. 268..... 17
Booth v. Kehoe, 71 N. Y. 341..... 7
Chapman v. Hunt, 254 Fed. Rep. 768, 13, 16, 19, 22
Etherbridge v. Sperry, 139 U. S. at pp. 277-278 23
First National Bank v. Pennsylvania Trust Co., 124 Fed. 968, 66 C. C. A. 100..... 21
Greey v. Dockendorff, 231 U. S. 513, 13, 17, 18, 19, 22
Gregory v. Morris, 96 U. S. 619..... 19
Griswold v. Sheldon, 4 N. Y. 581..... 9
Haskins v. Kelly, 24 N. Y. super. ct. 170..... 7
Hauselt v. Harrison, 105 U. S. 401..... 19

PAGE

Kilbourne v. Fay, 29 Ohio St. 264..... 7
Kribbs v. Alford, 120 N. Y. 524..... 17
In re Leslie-Judge, 272 Fed. Rep. 886..... 8
Marsh v. Woodbury, 1 Metc. 436..... 7
Martindale v. Booth, 3 Bainwall & Adol 498... 11
Re Michigan Furniture Co., 249 Fed. 974.... 7
McCaffey v. Woodin, 65 N. Y. 463.....17, 19
National Bank of Deposits v. Rogers, 166 N. Y. 380 .....16, 17
National Hudson Bank v. Chaskin, 28 App. Div. 315 7
Niles v. Mathusa, 162 N. Y. 546..... 7
Parshall v. Eggert, 54 N. Y. 18..... 15
Randall v. Cook, 17 Wend. 53..... 11
Robinson v. Elliott, 22 Wall. 513...8, 9, 10, 12
Ryall v. Rowles, 1 Vesey Senior p. 362..... 6
Sexton v. Kessler, 225 U. S. 90..7, 13, 14, 19, 22
Sexton v, Kessler, 172 Fed. Rep. 535....13, 20, 21
Stackhouse v. Holden, 66 App. Div. 423, 13, 14, 21
State Trust Co. v. Casino Co., 13 App. Div. 344 7
Twyne's Case, Coke Part III, 80-B..... 10
Union Trust v. Bulkeley, 150 Fed. Rep. 510, 17, 19
In re Volence, 197 Fed. Rep. 232..... 7
Wilds v. Board of Education, 227 N. Y. p. 217. 19
Williams v. Ingersoll, 89 N. Y. 508..... 22
Wiser v. Lawler, 189 U. S. 260..... 22
Wood v. Lawry, 17 Wend. 492..... 12
Wood v. U. S. Fidelity (D. C.), 143 Fed. 424.. 20
Young v. Upson, 115 Fed. Rep. 192..... 19

Supreme Court of the United States

WALLACE BENEDICT, as Receiver in Bankruptcy of the Hub Carpet Company, Petitioner, against AARON RATNER, Respondent.	October Term, 1921.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The decision sought to be reviewed was rendered by the United States District Court for the Southern District of New York, Judge Learned Hand writing the opinion, and unanimously affirmed by the Circuit Court of Appeals, with opinion, Hough, Manton and Mayer, JJ., sitting.

Facts.

On May 23rd, 1921, as security to Aaron Ratner for loans to be made by him to the Hub Carpet Company, the latter executed an assignment of its accounts due or to grow due. As part of the transaction, which occurred more than four months prior to the bankruptcy, the Hub Carpet Company delivered to him a complete and detailed list of its outstanding accounts, and on the 23rd or 24th of each following month, until

and including September 24, 1921, a like list of accounts was delivered to Ratner accompanied in each instance by a letter substantially in the form of the letter delivered with the September list (fol. 183):

> "Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23rd, 1921."

The assignment embraced

> "all sums of money, accounts and demands due and owing to us on our books of account, and such moneys, accounts and demands that will become due and owing to us, including our books of account, which may accrue and become due to us in the future in the ordinary course of business."

On the strength of this continuing collateral Ratner advanced a total of $30,000, as shown by his cancelled vouchers, $15,000 being lent as late as July 1st, 1921.

On September 17, 1921, Mr. Ratner learned that certain of the creditors had become dissatisfied and were pressing for payment of past due accounts. "I did not know then and certainly did not believe in the least that the company was insolvent, feeling simply that, like all businesses in times of depression it was having difficulty because of the more or less unreasonable pressure by one creditor or another" (fols. 184-6).

> "I felt that I was entitled to and I demanded the protection which by agreement had been given to me, and in reliance upon which I had advanced the $30,000. I so expressed

myself to the officers of the company on September 17, 1921, and it was agreed that I should receive the checks tha would thereafter come in in connection with its accounts receivable. Thereafter, and until the appointment of the Receiver, I did receive the checks, trade acceptances and notes which came in from customers who appeared upon the books of the Hub Carpet Company as debtors, and whose names appeared on the lists delivered to me, these obligations being turned over to me in precisely the form in which they were received, and so far as I know, constituted all the obligations received by the company following my demand on September 17th" (fols. 186-187).

The total so collected during the following ten days, and preceding the filing of the petition in bankruptcy against the Hub Carpet Co. on September 26th, was $11,581.78.

The assignment provided further (fols. 32-33):

"We, the Hub Carpet Company, further covenant and agree to fully disclose our business and financial conditions at any time the said Aaron Ratner so demands and hereby authorize him to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued.

"We further covenant and agree with the said Aaron Ratner on demand to turn over to the said Aaron Ratner any and all payments made to us by our debtors and to be applied by him in payment of any obligations due him, notwithstanding that the time for the payment of said obligations held by him at that time had not in fact become due and payable."

Mr. Ratner moved for an order requiring the receiver to turn over to him the proceeds of collections of assigned accounts until the total of the advance of $30,000, with interest, would be repaid. The motion was granted in the District Court, followed by unanimous affirmance in the Circuit Court of Appeals. Attention is respectfully drawn to the thoughtful opinions of both Courts, the holding in each instance being rested on two grounds, viz: (a) that the New York rule which declares a mortgage of chattels invalid where the right of disposal is reserved in the mortgagor, is predicated on physical possession of the tangible property which thus gives rise to reputed ownership, and has no application to intangibles; and (b) that the respondent having taken possession of the receivables, so far as they were capable of possession, some ten days before the appointment of the receiver, the lien which he thereby "fastened" became complete and enforceable.

The question stated:

Where, more than four months before a petition in bankruptcy is filed, an assignment is made in good faith of present and future business accounts as they accrue, as security for the repayment of advances thereupon made, a full statement of these accounts being rendered regularly each month to the assignee, does the consent of the latter that the assignor may continue to collect and use the accounts until he demands that they be turned over to him render the entire transaction invalid, even where such demand is made

and he actually takes over the accounts and begins their collection prior to the filing of a petition in bankruptcy and the appointment of a receiver?

POINT I.

Ostensible ownership arising from physical possession is the basis of the rule which obtains in some states, including New York, that a reserved right of disposal in a mortgage avoids the pledge of tangible property.

The rules which distinguish between tangible and intangible personal property run markedly through the Common Law and Statutes of England and America; and neither by reason nor authority can the language of the cases cited by petitioner, all of which deal with tangible property, be held to apply to the other.

The fallacy of petitioner's argument is that because mortgages of goods and chattels containing a reserved power of disposal are in the State of New York declared invalid, despite recording, it follows that the invalidity arises from some doctrine other than that of reputed ownership and applies to pledges of property incapable of physical possession as well as that capable thereof.

Petitioner closes his eyes completely to the classifications of personal property which in England marked the very earliest conceptions of property

in things, and which rested in the very nature of the property. The primitive method of acquiring anything was by occupancy or possession. Grants or gifts of chattels personal were at first possible only by actual possession. The rule requiring actual delivery of possession remained long unchanged except that, where goods could not be physically transferred because of bulk, or the like, delivery of the means of reducing to possession, such as keys to warehouse, bills of lading, etc., was permitted (*Ryall* v. *Rowles*, 1 Vesey Senior [1749], p. 362). The conception of a right or chose in action as apart from the thing itself came much later. The transfer of this right, at first prohibited "because thought to be a great encouragement to litigiousness," was later cognizable only in equity by way of declaration of trust in the assignor, in whose name alone the assignee was permitted to bring suit (Bl. Comm., Book 2, Ch. XXV., pp. 388, 397, 441-2).

Thus the law, distinguishing between chattels personal which on the one hand were capable of physical possession, and on the other were not so capable (which for brevity we may term respectively tangible and intangible), developed one set of rules for the one class and another set of rules for the other, just as definitely as it distinguished real property from personal. This distinction has been maintained to the present day, and in many states, including New York, we find it expressed in the interpretation of the phrase "goods and chattels" occurring in the chattel mortgage recording acts:

"The words 'goods and chattels' do not include choses in action, but only personal property which is visible, tangible and movable. (*Booth* v. *Kehoe*, 71 N. Y. 341; *State Trust Company* v. *Casino Company*, 13 App. Div. 344; *Haskins* v. *Kelly*, 24 N. Y. Super. Ct. 170; *Bacon* v. *Bonham*, 27 N. J. Eq. 212; *Kilbourne* v. *Fay*, 29 Ohio St. 264; *Marsh* v. *Woodbury*, 1 *Metc.* 436.)"

National Hudson Bank v. *Chaskin*, 28 App. Div. 315.

See also,

Niles v. *Mathusa*, 162 N. Y. 546;
Sexton v. *Kessler*, 225 U. S. 90;
Re Michigan Furniture Co., 249 Fed. 974.

By the continued use of this phrase in the recording acts, legislatures have expressed the intention that this distinction continue.

Assuming the governing doctrine to be other than that of reputed ownership, it does not at all follow that it applies equally to all classes of personal property, and that the distinctions developed and observed through these centuries at once disappear. It is not too much to expect that, before acceding to the obliteration of these distinctions, petitioner's counsel refer us to a single court of pertinent jurisdiction which shares or even intimates his view. We speak of courts of pertinent jurisdiction because even as to chattels capable of physical possession many important states are opposed to the New York rule that the reservation of the power of disposal renders the mortgage void as a matter of law (5 *Amer. & Eng. Encyc. of Law*, 2d ed., pp. 992 and 993). Every case cited

by petitioner here as opposed to the holdings of the courts below, directly involves chattels capable of ostensible ownership, and the general language of these cases, though separated from the context, still remains language applicable only to that class of goods and chattels. The only exception is the *Leslie-Judge* case, which involved the question of the pledge of good will as well as of chattels. Since good-will is an intangible which cannot exist except as part of and related to the tangibles of a business, it was held that the reserved right to dispose of the tangibles made the mortgage void as to both, since they were inseparable, under the rule that where part of a transaction is declared void for fraud (actual or presumed), the whole transaction must fall.

In re Volence, 197 Fed. Rep. 232;
In re Leslie-Judge, 272 Fed. Rep. 886.

Historically, mere failure to change possession at first rendered the transaction void; the rigor of this rule gradually was relaxed, but never it seems to the extent of validating a transaction where both possession *and* the right of disposal were reserved. The recording acts, dealing with possession only, clearly did not validate a transaction where also the right of disposal was reserved. And the cases so hold.

"Men get credit by what they apparently own and possess" is a notable summary of the true basis of the doctrine, enunciated by this Court in the first case before it which directly involved the effect of reserved power of disposal by the mortgagor of chattels (*Robinson* v. *Elliott*, 22 Wall. 525). This Court

observed that the precise question had "never before been presented" to it, and that "The cases cannot be reconciled by any process of reasoning or on any principles of law." Thereupon it proceeded to place its decision squarely upon the doctrine in question in language that leaves little room for the illusory theory which petitioner offers:

> "Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion."
>
> *Robinson* v. *Elliott*, 22 Wall. 525.

And the New York rule with regard to the reserved right of disposal, however general the language of some of the cases may be, rests also on this doctrine of ostensible ownership:

> "There would be no hope of maintaining honesty and fair dealing, if the courts should allow a mortgagee or vendee to succeed in a claim to personal property against creditors and purchasers, after he had not only left the property in the possession of the debtor, but had allowed him to deal with and dispose of it as his own."
>
> *Griswold* v. *Sheldon*, 4 N. Y. 581, 590.

Even the briefest of reference to early English decisions shows ostensible ownership, and nothing else, to be the origin of the rule there, as it is here. Probably the earliest definite declaration of the rule and the principle upon which it is based occurs in *Twyne's* case (Coke, Part III, 80-b), decided in 1601, and cited in *Robinson* v. *Elliott.* One Pierce, indebted to Twyne and others, transferred to Twyne his personal property, including sheep, in satisfaction of a debt, but nevertheless continued in possession of the property, "used them as his own," and in due time "shore the sheep and marked them with his own mark." The Court of Star Chamber declared that

> "the donor continued in possession *and used them as his own* and that *by reason thereof,* traded and trafficked with others and defrauded and deceived them."

Later the doctrine was enacted into statute (1623; 21st James I., Ch. XIX), which, as a practice at which it expressly aimed and prohibited, recited a precise definition of the doctrine of reputed ownership:

> "(5) And for that it often falls out, that many Persons before they become Bankrupts, do convey their Goods to other Men upon good consideration, *yet still keep the same,* and are reputed the Owners thereof, *and dispose the same as their own,"*

following which is the declaration that such property shall be seized and sold for the benefit of the creditors of the person in possession.

Ever since the *Twyne* case and this statute, the courts have consistently, as far as we have been able to discover, refused to enforce a sale or mortgage where both possession *and* the right of disposal were reserved by the owner, solely and clearly on the doctrine of apparent or reputed ownership.

The history of chattel mortgages in England was similar to that of sales; in time the rule relaxed so that the retention of possession in case of mortgage, just as in the case of sale, constituted only evidence of fraud rather than its absolute badge (*Martindale* v. *Booth*, 3 Bainewall & Adol. 498). In his work on chattel mortgages Mr. Jones observes (Section 379):

> "Prior to the enactment of laws for registering mortgages of personal property, the retention of possession by the mortgagor, like the retention of possession by the vendor after absolute sale, was either presumptive or conclusive evidence of fraud. This rule was designed to prevent a person from acquiring a false credit on the strength of the possession and apparent ownership of property which he had sold or mortgaged. This was the doctrine of the courts and not a declaration of statute."

See also

Randall v. *Cook*, 17 Wend. 53.

The recording acts dealt only with the question of possession, and completely removed from its continuance the stigma which had theretofore attached; but not so with the reserved right of disposal. That remained as much a "fraud" in the eyes of the law, after the recording acts, as it had

been unchangingly from the time of *Twyne's* case. And this Court points that out specifically in *Robinson* v. *Elliott, supra* (p. 521):

> "It is true the law conferred on the parties the right to agree that the possession of the property could remain with the mortgagor, provided the mortgage be recorded; but if the mortgage contains other provisions, which, on legal principles, vitiates the whole instrument, it is difficult to see how recording it could make it even prima facie valid. The Bill of Sales Registration Act in England makes void all bills of sale not filed as required, if unaccompanied by possession. An eminent writer in speaking of this act says:
>
> " 'Of course, the mere fact of due registration of a bill of sale, under this act, does not necessarily make it good against creditors. The act was not passed with a view of making good a title which was not good before, but for the protection of creditors.' "

See also

Wood v. *Lowry,* 17 Wend. 492.

It is clear that the rule set forth in the cases cited by petitioner is directly traceable to the *Twyne* case, the *Statute of James,* and the many decisions which followed. It is based expressly upon the doctrine of reputed ownership arising from the physical possession of goods and chattels and the right of the possessor to deal with them as his own. The rule has always been limited to "goods and chattels"; and neither in reason, nor historically, does it apply to the intangible right called a chose in action.

Such is the express holding of this Court:

Greey vs. *Dockendorff*, 231 U. S. 513.
Sexton v. *Kessler*, 225 U. S. 90.

And such is the specific statement (quoted at page 14 of this brief) of the New York Appellate Division in a case where the facts were strikingly similar.

Stackhouse v. *Holden*, 66 App. Div. 423.

POINT II.

The decisions of Federal and State Courts sustain the validity of the instrument under review.

Sexton v. *Kessler*, 225 U. S. 90;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Stackhouse v. *Holden*, 66 (N. Y.) A. D. 423;
Sexton v. *Kessler*, 172 Fed. Rep. 535.

In *Stackhouse* v. *Holden*, *supra*, accounts were assigned as collateral security for the obligations of the assignor, and by the very terms of the written agreement the assignor was authorized to collect these accounts and use the proceeds as he saw fit. The assignment was upheld. In doing so, the Appellate Division in a single paragraph disposes completely of the argument which the petitioner makes in the case at bar:

> "The rule pertaining to a change of possession of goods and chattels upon a sale thereof, or to the filing of a lien thereon, and the dominion required to be exercised by a purchaser, mortgagee or pledgee of tangible property, cannot be applied to a sale or pledge of indebtedness, intangible in itself, only the evidence of which if in writing is perceptible; the conditions are not the same, and the rules of law applicable to transfers of the two classes of property differ; as to one, the possession of which is evidence of ownership, the dealings must be open, visible and public, while as to the other the business may be, as it usually is, private. The necessities of business require it. Aside from the provision of the Bankrupt Law prohibiting preferences, and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit, and any attempt to apply fixed rules for the transaction of the business would interfere with this undoubted right."
>
> *Stackhouse* v. *Holden, supra,* at p. 427.

Petitioner concedes that this case is directly in point. We respectfully submit it is the law.

In *Sexton* v. *Kessler, supra,* the bankrupt set aside certain securities for the defendant, reserving the right to use some of them from time to time and to substitute others in their place. Withdrawals and substitutions were made. Possession of the original and substituted securities was retained by the bankrupt until fourteen days before the filing of a petition in bankruptcy. At that time possession was delivered to the defendant, who

knew that pledgor was insolvent. The agreement was unanimously declared by this Court to be a valid assignment.

While there may be an inconsequential difference in detail between the Sexton case and the case at bar, not one argument made here by the petitioner was omitted in that appeal; and Judge Holmes summarized for the Court in the following language the whole point of appellant's contention in that case, as well as petitioner's in this, as follows (p. 97):

> "So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or at least one that is to be preferred to the claim of the trustee. * * *
>
> "The most obvious objection is that the continued physical power of the New York firm over the securities and its right to withdraw and substitute admittedly reserved are inconsistent with a title or lien of the English house in any form."

In upholding the transaction this court brushed aside the objection thus stated as well as the objection that the actual delivery of the securities to defendant occurred immediately prior to the bankruptcy and therefore was presumptively fraudulent (p. 99).

> "When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York and in the absence of any controlling statute to the contrary such we understand to be what the law should be. *Parshall* v. *Eggert*, 54 N. Y. 18; *National Bank of Deposit* v. *Rogers*, 166 N. Y. 380."

We have, too, the case of *Chapman* v. *Hunt*, 254 Fed. Rep. 535. There the bankrupt assigned by way of collateral security its outstanding *accounts receivable* under written agreement by which the bankrupt was to collect the accounts and use the proceeds in its business upon assigning to the defendant an equal amount of new accounts. This course was pursued for almost a year and a half. The bankrupt proceeded with the collection of the assigned accounts, used the proceeds in its business, and assigned new accounts from time to time. There was furnished to Hunt monthly a list of assigned accounts stamped with a notice of assignment.

The agreement with Hunt was carried out until April 16, 1916, when he was given a new list of receivables. Two days later he arranged that the candy company take up all his notes, advanced the money with which to do so, a total of $8,000, and as collateral security therefor received assignments of accounts, some of which were new and some of which had theretofore already been assigned to him in the amout of $1,998.62, or $3,002.18 in all. Hunt knew at this time, or had reasonable cause to believe, "that the candy works was insolvent." Less than a month later an involuntary petition in bankruptcy was filed against the candy works and an adjudication followed.

The Circuit Court of Appeals unanimously upheld the transaction, declared that the Court below was in error in holding that the transaction of April, 1916, "was an entirely new

and independent one, constituting a transfer within four months of the filing of the petition," that Hunt's knowledge in April, 1916, of the company's insolvency "did not make the agreement of January 13, 1915, invalid," and required the trustee to account to Hunt.

POINT III.

The taking possession of the assigned accounts prior to the filing of the petition in bankruptcy perfected the lien thereon of the assignee, and the rights of the subsequently appointed Receiver and Trustee became subject thereto.

The moment accounts came into the ownership of the Hub Carpet Company the original agreement operated "* * * by way of present contract to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into ownership of the party."

McCaffrey v. *Woodin*, 65 N. Y., p. 463.

See also

Greey vs. *Dockendorff*, 231 U. S. 513.
National Bank v. *Rogers*, 166 N. Y. 390;
Kribbs v. *Alford*, 120 N. Y. 524;
Union Trust v. *Bulkeley*, 150 Fed. Rep. 510;
Boise v. *Talcott*, 212 Fed. Rep. 268;
Barnes v. *Alexander*, 232 U. S. 117.

As was said in the last cited case:

> "It is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired, will make the contractor a trustee as soon as he gets title to the thing."

Justice Holmes of this Court makes the same point in his decision in *Greey* v. *Dockendorff*, supra, in the following language (p. 516):

> "The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *N. Y.*, 6 N. Y. 179."

The lists of accounts delivered monthly by the company to Mr. Ratner with the letter of transmittal, which in each instance referred to them as "accounts receivable assigned to you in accordance with our agreement of May 23, 1921," identified the accounts embraced in the assignment and set them aside and placed them as completely in his possession as the nature of the property permitted. Indeed, beginning September 17, pursuant to the demand of Mr. Ratner under the terms of his agreement of May 23, 1921, all checks and payments were turned over to him in the form in which they were received; and this continued to the time of the delivery of the September 23rd list, and thereafter until the filing of the petition in bankruptcy. Whatever may be argued as to Mr. Ratner's rights in other circumstances, it must be clear that as to the accounts collected by him prior to such filing, and as to those included in the September 23rd list, his rights be-

came so fixed and perfected that, until satisfied, these accounts were withdrawn from the estate to which the trustee later became entitled.

It is the settled rule in New York that a pledgee or lienee perfects his rights by the act of so taking possession:

> " * * * as soon as that act has intervened, the lien of the creditor becomes perfect, and in the absence of statutory regulations prevails over the lien of subsequent executions."
>
> *McCaffrey* v. *Woodin*, 65 N. Y., p. 463.

See also

Greey vs. *Dockendorff*, 231 U. S. 513;
Wilds v. *Bd. Education*, 227 N. Y., p. 217;
Gregory v. *Morris*, 96 U. S. 619;
Union Trust Co. v. *Bulkeley*, 150 Fed. Rep. 510;
Sexton v. *Kessler*, 225 U. S. 90;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Young v. *Upson*, 115 Fed. Rep. 192;
Bailey v. *Baker Ice Machine Co.*, 239 U. S., at pp. 275-276.

The last cited case, directly supporting the point, is outlined in the opinion of the Circuit Court of Appeals herein, and seems to be decisive.

The following from the Circuit Court of Appeals, Second Circuit, is equally pertinent:

> "Doubtless a court of equity would not interevene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor; but no such assistance would have been needed, the mortgagor having vol-

untarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagee. *Hauselt* v. *Harrison*, 105 U. S. 401, 26 L. Ed. 1075; *Wood* v. *U. S. Fidelity Co.* (D. C.), 143 Fed. 424."

Sexton v. *Kessler*, 172 Fed. Rep., at p. 538.

There would seem to be little room for argument left on this point after reading the opinion of Mr. Justice Holmes in the *Greey* case, *supra*, in which he points out that the delivery to the assignee of accounts assigned under a general agreement perfects the equitable lien created by that agreement, and that the rights of the assignee cannot be disturbed where between the receipt of the accounts by the assignor and their delivery to the assignee no condition intervened such as attachment, and the like. This exactly describes the conditions surrounding the case at bar.

POINT IV.

The good faith of the transaction is not open to question.

The Court below declares (pp. 99-100, transcript of record):

"There is nothing in this record to warrant even a suggestion of fraud. The loan by Mr. Ratner and the assignment of Hub Carpet Co. of the accounts receivable, constituted a legitimate and businesslike transaction whereby

> a considerate father was willing to help his son and the latter's associates in maintaining what, at the time, seemed to be a hopeful business. The questions involved, therefore, are solely questions of law."

The District Court also disposed of the matter as one of law.

The petitioner, having thus treated the matter from the outset, is hardly in a position now to impugn the *bona fides* of the transaction, and the very testimony as to secrecy which he quotes in that regard is but a paraphrase of what the Courts have themselves pointed out as constituting the inherent difference in dealings with tangibles and intangibles:

> "In regard to the secrecy of the lien, it may be observed that every pledge of securities may be and generally is done in secret. Dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be so used to procure credit or capital."
>
> *Stackhouse* v. *Holden,* 66 A. D., p. 426.

> "The public was not giving credit to the New York house on the strength of its apparent ownership of these securities because it knew nothing at all about them. The *visible possession* of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors. Yet ownership of chattels where there has been no change of possession will be protected if they are set apart and marked and in this way notice is given to the public. *First National Bank* v.

> *Pennsylvania Trust Co.*, 124 Fed. 968, 60 C. C. A. 100. *There was, however, as to the securities under consideration, no secrecy which was not inherent in their nature. The public does not know what stocks, bonds, or notes a merchant has, and therefore does not give him credit because of them.*"
>
> *Sexton* v. *Kessler*, 172 Fed. Rep. at 539.

Further on this point is the language of Justice Holmes in the *Greey* case, *supra* (p. 516):

> "It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors (Williams v. Ingersoll, 89 N. Y. 508, 522), and merely keeping silence to the latter, whether known or unknown, created no estoppel (Wiser v. Lawler, 189 U. S. 260, 270, 47 E. ed. 802, 809, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630; Ackerman v. True, 175 N. Y. 353, 363, 67 N. E. 629)."

The four-month rule does not apply, for the cases expressly hold that the various deliveries of the receivables lists, and the taking over of the accounts, relate back to the date of the original agreement, May 23, 1921; and petitioner does not contend otherwise.

> *Sexton* v. *Kessler*, 225 U. S. at p. 99;
> *Idem*, 175 Fed. Rep. p. 539;
> *Chapman* v. *Hunt*, 254 Fed. Rep. 768.

POINT V.

No question of public interest is involved; dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be used to procure credit or capital.

This is the very view expressed by the Appellate Division of New York in the *Stackhouse* case, quoted above. It is supported by the observations of the Circuit Court of Appeals in this case:

> "It is a matter of common knowledge that the merchant utilizes his accounts receivable and other kinds of choses in action to keep his business liquid and everyone expects that he may sell or pledge such choses in action for that very purpose."
>
> Folio 312, transcript of record.

The common practice of utilizing accounts receivable has long ago been met by the equally common practice on the part of credit departments to demand a statement of assets pledged as well as of assets and liabilities generally.

Petitioner is fearful of the disastrous effect of holding valid such an instrument as involved in this case. This court rejected a similar argument even in connection with chattel mortgages (*Etherbridge* v. *Sperry,* 139 U. S. at pp. 277-278):

> "Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards in-

creased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought, whether the rulings made by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. * * * Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right, or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking of possession by a creditor results in closing the business, and turning the debtor out of employment. * * * The fact that fraudulent relations are possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one unaffected by any settled law of the State, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith, and that the decision of the Supreme Court of Iowa rests on sound principles."

It has been the declared law in this state (New York) at least since 1901 (when the *Stackhouse* case was decided), that assignments of accounts receivable made under circumstances and for pur-

poses similar to those in the case at bar, are valid and enforceable. Apparently, business has been transacted for these many years on that basis, without complaint. The decision of the Court below rather than affecting "most seriously the whole commercial credit system of the country," as petitioner contends, continues it on the principles on which it has been established and on conditions under which it has thrived.

This court has theretofore clearly expressed its views that transactions such as took place between the respondent and bankrupt are valid and enforceable. Petitioner's arguments have been heard by two learned courts, each of which, after careful consideration, had unanimously rejected them. To permit the petitioner further to press the matter would, we respectfully submit, work an injustice upon the creditors of the bankrupt and a needless expense to the estate.

CONCLUSION.

The law is settled in respondent's favor and the petition should be denied.

All of which is respectfully submited.

New York, May 25th, 1922.

LOUIS S. POSNER,
Solicitor and Counsel for Respondent.

FILED
APR 20 1923
WM. R. STANSBU
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. [redacted]11

WALLACE BENEDICT, as Receiver in Bankruptcy of The Hub Carpet Company,
Appellant,

vs.

AARON RATNER,
Appellee.

(On Writ of Certiorari.)

BRIEF FOR APPELLEE.

LOUIS S. POSNER,
Counsel for Appellee,
115 Broadway,
New York City.

INDEX.

PAGE

Index of Cases Cited..... iii

Facts 1

The Question Stated 4

Outline of Argument 5

I. By operation of the assignment a lien in equity, enforcible as between the parties, attached to the accounts receivable as soon as the assignor acquired them; this lien became perfected in law and enforcible also as to the receiver and other third parties when, pursuant to the terms of the assignment, the assignee took over these accounts before the filing of the petition in bankruptcy..... 9

II. Cases which deal with the assignment of intangible property directly sustain the decision here 21

III. Ostensible ownership arising from physical possession is the basis of the New York rule that a chattel mortgage, though recorded, is void if the mortgagor reserve the right to dispose of the property as his own without accounting therefor to the mortgagee; such also is the principle underlying the chattel mortgage recording acts; controlling decisions exclude accounts re-

PAGE

ceivable from the operation both of the rule and the statute because they are choses in action and are insusceptible of ostensible ownership 26

IV. The good faith of the transaction is not open to question..... 37

IVa. The four-month rule does not apply.. 39

V. Dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be used to procure credit or capital; the constricting rule for which appellant argues would interfere with the facilities of property transfer which business demands and courts uphold.. 40

VI. The decision of the court below was right and should be affirmed..... 42

INDEX OF CASES.

PAGE

Bailey v. Baker Ice Machine Co., 239 U. S. at pp. 275-276.....6, 14, 17, 28
Barnes v. Alexander, 232 U. S. 117..... 11
Boise v. Talcott, 212 Fed. Rep. 268..... 11
Brackett v. Harvey, 91 N. Y. 214.....7, 39
Central Trust Co. v. West India Imp. Co., 169 N. Y. 323..... 10
Chapman v. Hunt, 254 Fed. Rep. 768..14, 21, 24, 39
Coats v. Donnell, 94 N. Y. 168..... 10
Deeley v. Dwight, 132 N. Y. 59..... 10
Dooley v. Pease, 180 U. S. 126..... 11
Etheridge v. Sperry, 139 U. S. at pp. 277-278 .....36, 40
Field v. N. Y., 6 N. Y. 179..... 10
Greey v. Dockendorff, 231 U. S. 513..5, 7, 11, 13, 14, 18, 21, 27, 34, 38
Gregory v. Morris, 96 U. S. 619..... 14
Griswold v. Sheldon, 4 N. Y. 581..... 30
Heermans v. Ellsworth, 64 N. Y. 159..... 13
Holmes v. Evans, 129 N. Y. 140..... 10
Holroyd v. Marshall, 10 House of Lords Cases 191 14
Hovey v. Elliot, 118 N. Y. 124.....14, 16, 20
In re Doran, 154 Fed. 467..... 11
Kribbs v. Alford, 120 N. Y. 524.....5, 10
In re Leslie-Judge, 272 Fed. Rep. 886..... 29
McCaffrey v. Woodin, 65 N. Y. 463..5, 6, 10, 14, 15, 20
In re McCauley, 158 Fed. Rep. 332.....7, 13
McDonnell v. Buffalo, 193 N. Y. 104..10, 14, 20
McNeely v. Welz, 166 N. Y. 128..... 24
Matter of Black, 138 App. Div. 565....14, 15, 20

PAGE

Martindale v. Booth, 3 Bainwall & Adol 498.. 32
Re Michigan Furniture Co., 249 Fed. 974..7, 21, 25, 27, 35
National Bank of Deposits v. Rogers, 166 N. Y. 380..... 10
National Hudson Bank v. Chaskin, 28 App. Div. 315..... 27
Niles v. Nathusa, 162 N. Y. 546.....6, 24, 27
Randall v. Cook, 17 Wend. 53..... 32
Robinson v. Elliott, 22 Wall 513.....29, 31, 32
Rochester Distilling Co. v. Rosey, 142 N. Y. 577 10
Sexton v. Kessler, 225 U. S. 90....6, 7, 11, 14, 16, 21, 22, 27, 34, 39
Sexton v. Kessler, 172 Fed Rep. 525.....16, 38
Spring v. So. Carolina Ins. Co., 8 Wheaton 268 13
Stackhouse v. Holden, 66 App. Div 423.7, 21, 27, 34, 37, 40
Tailby v. Official Receiver, 13 A. C. 523..... 12
Thompson v. Fairbanks, 196 U. S. 516..5, 6, 7, 11, 19, 20, 39
Twyne's Case, Coke Part III, 80-B..... 31
Union Trust v. Bulkeley, 150 Fed. Rep. 510.....7, 11, 13, 14, 24
Wilds v. Board of Education, 227 N. Y. p. 217 14
Williams v. Ingersoll, 89 N. Y. 508..... 13
Wisner v. Occumpaugh, 71 N. Y. 113..... 10
Wood v. Lawry, 17 Wend. 492..... 33
Young v. Upson, 115 Fed. Rep. 192..... 14

Supreme Court of the United States

OCTOBER TERM, 1922,

No. 400.

WALLACE BENEDICT, as Receiver in Bankruptcy of the Hub Carpet Company, Appellant, against AARON RATNER, Appellee.	On Writ of Certiorari.

BRIEF FOR APPELLEE.

The decision sought to be reviewed was rendered by the United States District Court for the Southern District of New York, Judge Learned Hand writing the opinion, and unanimously affirmed by the Circuit Court of Appeals, with opinion, Hough, Manton and Mayer, JJ., sitting.

Facts.

On May 23rd, 1921, as security to Aaron Ratner for loans to be made by him to the Hub Carpet Company, the latter, within the City and State of New York, executed and delivered an assignment of its accounts *due or to grow due.* As part of the transaction, which occurred a little more than four months prior to the bankruptcy of the Company, the Hub Carpet Company delivered to him a complete and detailed list of its outstanding

accounts, and on the 23rd or 24th of each following month, until and including September 24, 1921, a like list of accounts was delivered to Ratner accompanied in each instance by a letter substantially in the form of the letter delivered with the September list (fol. 183):

> "Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23rd, 1921."

The assignment embraced

> "all sums of money, accounts and demands due and owing to us on our books of accounts, and such moneys, accounts and demands that will become due and owing to us, including our books of account, which may accrue and become due to us in the future in the ordinary course of business."

On the strength of this continuing collateral Ratner advanced a total of $30,000, as shown by his cancelled vouchers, $15,000 being lent as late as July 1st, 1921, barely more than two months before the filing of an involuntary petition in bankruptcy.

On September 17, 1921, Mr. Ratner learned that certain of the creditors had become dissatisfied and were pressing for payment of past due accounts. "I did not know then and certainly did not believe in the least that the company was insolvent, feeling simply that, like all businesses in times of depression it was having difficulty because of the more or less unreasonable pressure by one creditor or another" (fols. 184-6).

> "I felt that I was entitled to and I demanded the protection which by agreement had been given to me, and in reliance upon which

I had advanced the $30,000. I so expressed myself to the officers of the company on September 17, 1921, and it was agreed that I should receive the checks that would thereafter come in in connection with its accounts receivable. Thereafter, and until the appointment of the Receiver, I did receive the checks, trade acceptances and notes which came in from customers who appeared upon the books of the Hub Carpet Company as debtors, and whose names appeared on the lists delivered to me, these obligations being turned over to me in precisely the form in which they were received, and so far as I know, constituted all the obligations received by the company following my demand on September 17th" (fols. 186-187).

The total so collected during the following ten days, and preceding the filing of the petition in bankruptcy against the Hub Carpet Co. on September 26th, was $11,581.78.

The assignment provided further (fols. 32-33):

"We, the Hub Carpet Company, further covenant and agree to fully disclose our business and financial conditions at any time the said Aaron Ratner so demands and hereby authorize him to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued.

"We further covenant and agree with the said Aaron Ratner on demand to turn over to the said Aaron Ratner any and all payments made to us by our debtors and to be applied by him in payment of any obligations due him, notwithstanding that the time for the payment of said obligations held by him at that time had not in fact become due and payable."

Mr. Ratner moved for an order requiring the receiver to turn over to him the proceeds of collections of assigned accounts until the total of the advance of $30,000, with interest, would be repaid. The motion was granted in the District Court, followed by unanimous affirmance in the Circuit Court of Appeals, limited, however, to those accounts which were set out in the list last previously delivered to Mr. Ratner.

Attention is respectfully drawn to the thoughtful opinions of both Courts, the holding in each instance being rested on two grounds, viz: (a) that Mr. Ratner having taken possession of the receivables, so far as they were capable of possession, some ten days before the appointment of the receiver, the lien which he thereby "fastened" upon such receivables became complete and enforcible; and (b) that the New York rule which declares a mortgage of chattels invalid where the right of disposal is reserved in the mortgagor, is predicated on physical possession of the tangible property which thus gives rise to reputed ownership, and has no application to intangibles.

The question stated:

Where more than four months before a petition in bankruptcy is filed, an assignment is made in good faith of present and future business accounts as they accrue, as security for the repayment of advances thereupon and thereafter to be made, a full statement of these accounts being rendered regularly each month to the assignee, does the consent of the latter that the assignor may continue to collect and use the accounts until he demands that they be turned over to him render the trans-

action invalid, where such demand is made and he actually takes over the designated accounts and begins their collection prior to the filing of a petition in bankruptcy and the appointment of a receiver?

OUTLINE OF ARGUMENT.

An assignment of property to be acquired thereafter operates by way of present contract to give a lien which, *as between the parties,* takes effect and attaches to the subject of it as soon as it comes into the ownership of the assignor. Equitable liens of this character are familiar to the law.

Kribbs v. *Alford,* 120 N. Y. 524;
Greey v. *Dockendorff,* 231 U. S. 516.

Such lien becomes perfected and ripens into a right *at law* which is enforcible *against third parties* if, after the property is acquired, the assignee take possession thereof prior to an execution or attachment levy thereon, or the like, by third parties, or the appointment of a receiver upon the filing of a petition in bankruptcy by or against the assignor.

McCaffrey v. *Woodin,* 65 N. Y. 463;
Thompson v. *Fairbanks,* 196 U. S. 516.

On May 23, 1921, an agreement was made by the Hub Carpet Company with Mr. Ratner for advances which were to be secured by the then existent and future accounts receivable, upon the strength of which his advances totalled $30,000., $15,000. having been advanced

as late as July 1st. At the time of the agreement and on the 23rd day of each month thereafter, a list of the accounts receivable was delivered to Mr. Ratner, accompanied by a letter of transmittal which in each instance referred to them as accounts receivable assigned in accordance with the agreement of May 23, 1921; beginning September 17th, pursuant to the demand of Mr. Ratner under the terms of his agreement, all payments were turned over to him in the very form in which they were received, and this continued to the time of the delivery of the September 23rd list and thereafter until the filing of the petition in bankruptcy. These facts constitute the equivalent, and more than the equivalent, of taking possession of the accounts receivable to the full extent that the nature of these choses in action permitted. And since this was done before any third parties had "fastened" a lien, it is enforcible against third parties, including the receiver in bankruptcy and his successor trustee.

Bailey v. *Baker Ice Machine Co.*, 239 U. S. 275-276;
Thompson v. *Fairbanks, supra;*
McCaffrey v. *Woodin, supra;*
Sexton v. *Kessler,* 225 U. S. 90.

The agreement in question was not recorded because the recording acts of New York permit this to be done only with reference to "goods and chattels," and exclude choses in action from their operation.

Niles v. *Methusa,* 162 N. Y. 546.

The *four-month rule* does not apply to the situation since the intervening acts by which possession was taken of the after acquired accounts relate back to the date of the original agreement, which took place more than four months previously.

Bracket v. *Harvey,* 91 N. Y. 214;
Thompson v. *Fairbanks, supra;*
Sexton v. *Kessler, supra.*

Such cases as have been found which deal with the assignment of intangibles or choses in action, present or future, such as accounts, bonds, and the like, sustain the position of the appellee and entitle him to the proceeds of the balance of the accounts, at least of those accounts which were included in the list last delivered to him, until his loans are repaid in full with interest.

Stackhouse v. *Holden,* 66 A. D. (N. Y.) 423
Sexton v. *Kessler, supra;*
Greey v. *Dockendorff, supra;*
In re Michigan Furniture Company, 249 Fed. Rep. 974;
Union Trust v. *Bulkeley,* 150 Fed. Rep. 510;
In re McCauley, 158 Fed. Rep. 332.

No question of good faith exists in the case despite the elaborate argument of appellant, based upon the secrecy of the transaction, which we maintain to be a condition inherent in it and which the courts so recognize.

Greey v. *Dockendorff, supra,* at page 516;
Stackhouse v. *Holden, supra.*

Appellee willingly rests his claim of good faith upon the declaration of the Circuit Court below that

> "There is nothing in this record to warrant even a suggestion of fraud."

It is the law in New York that a mortgage of goods and chattels wherein the mortgagor reserves the right of disposal, for his own benefit, is deemed fraudulent in law and void. Upon this the appellant bases his whole appeal, his argument being that if the mortgage be thus void, though recorded, it follows that the rule must apply to all assignments or mortgages of personal property, regardless of their nature, and whether capable or incapable of reputed ownership through possession plus the reserved power of disposal. This argument we believe to be unsound, for the rule *does* rest in the original conception that the visible possession of personal property indicated ownership, a condition which cannot in its nature apply to such intangible property as choses in action, and which has never been held so to apply in any decisions which we have been able to find or which the appellant cites. The doctrine in question, based upon the conceptions of reputed ownership in the days when rights of property had their beginnings, must be deemed to be greatly out of joint with modern conceptions of industry and modes of possession; in any event, the doctrine, if it cannot be disregarded, should at least be limited and held within its present confines rather than extended into a field where it never before has played a part and where it can but serve as an embarrassment to business. Such considerations of public interest

as here exist point clearly that way, particularly since those who enter into business relations know full well that the utilization of accounts receivable, in order to keep business liquid, is one of the commonest practices of every day business.

POINT I.

By operation of the assignment a lien in equity, enforcible as between the parties, attached to the accounts receivable as soon as the assignor acquired them; this lien became perfected in law and enforcible also as to the receiver and other third parties when, pursuant to the terms of the assignment, the assignee took over these accounts before the filing of the petition in bankruptcy.

We believe appellant leads far afield in straining to apply to the assignment of choses in action, represented by accounts receivable, the rules which govern mortgages of tangible property denominated "goods and chattels". These rules, which we discuss later, cannot be permitted to divert attention from the settled principles which govern in the instant case, and which are outlined in the above head-note. Future accounts receivable, as well as those then existent, were assigned by the Hub Carpet Company to Mr. Ratner as security for moneys then owing and thereafter to be advanced to it, which advances aggregated $30,000.

With regard to such an agreement the rule, frequently declared in state and federal decisions, is that it operates

> "* * * by way of present contract to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party."
>
> *Kribbs* v. *Alford*, 120 N. Y. p. 524.

> "A party cannot mortgage property which he does not have, but he can agree to mortgage it or give a lien upon it as soon as he gets it, and equity will enforce the agreement and establish the lien. (*Kribbs* v. *Alford*, 120 N. Y. 519; *Deeley* v. *Dwight*, 132 N. Y. 59; *Hale* v. *Omaha Nat. Bank*, 49 N. Y. 626; *Husted* v. *Ingraham*, 75 N. Y. 251; *Coats* v. *Donnell*, 94 N. Y. 168; *Hovey* v. *Elliott*, 118 N. Y. 124; *Smith* v. *Smith*, 125 N. Y. 224.)."
>
> *National Bank of Deposit* v. *Rogers*, 166 N. Y. p. 390.

See also,

McCaffrey v. *Woodin*, 65 N. Y. 463;
Field v. *New York*, 6 N. Y. 179;
Wisner v. *Ocumpaugh*, 71 N. Y. 113;
Coats v. *Donnell*, 94 N. Y. 168, 177;
Rochester Distilling Co. v. *Rosey*, 142 N. N. p. 577;
Deeley v. *Dwight*, 132 N. Y. 59, 64;
Holmes v. *Evans*, 129 N. Y. 140;
National Bank v. *Rogers*, 166 N. Y. p. 390;
McDonnell v. *Buffalo &c Co.*, 193 N. Y. p. 104;
Central Trust Co. v. *West India Imp. Co.*, 169 N. Y. p. 323.

"The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. (*Field* v. *New York*, 6 N. Y. 179)."

Greey v. *Dockendorff*, 231 U. S., 513, 516.

See also,

Sexton v. *Kessler*, 225 U. S. 99.

Union Trust v. *Bulkeley*, 150 Fed. Rep. 510.

Boise v. *Talcott*, 212 Fed. Rep. 268.

"It is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired, will make the contractor a trustee as soon as he gets title to the thing."

Barnes v. *Alexander*, 232 U. S. 117, 121.

This doctrine of equitable lien is now quite uniformly recognized.

The validity of the assignment to Mr. Ratner is, of course, to be determined in accordance with the New York decisions.

"Whether, and to what extent a mortgage of this kind is valid, is a local question and the decisions of the State Court will be followed by this Court in such case."

Thompson v. *Fairbanks*, 196 U. S. 516.

Dooley v. *Pease*, 180 U. S. 126.

"It is 'to be borne constantly in mind, that the state law determines the efficiency of acts and transactions to effect the transfer of title of the property involved.'"

Remington on Bankruptcy, 2nd Ed. Vol. II, Secs. 1140 and 1275;

Sexton v. *Kessler*, 225 U. S. 90;

In re Doran, 154 Fed. Rep. 467.

If, therefore, it be also the law of New York that by taking possession of these accounts, (so far as they were susceptible of possession), before any rights of third parties intervened by way of attachment, levy, or receivership, Mr. Ratner's lien became "fastened", perfected and enforcible against third parties, it follows that the decision of the Court below was right and should be affirmed.

Such undoubtedly is the settled law in New York.

The lists of accounts delivered monthly by the company to Mr. Ratner with the letter of transmittal, which in each instance referred to them as "accounts receivable assigned to you in accordance with our agreement of May 23, 1921," *identified the accounts embraced in the assignment and set them aside and placed them as completely in his possession as the nature of the property permitted.* Each such letter and each such monthly list was a separate reiteration of the original agreement and a separate identification of the accounts coming within its operation, if indeed any such identification were necessary, since "all" accounts were included, and that term sufficiently identifies. (*Tailby* v. *Official Receiver* (1888), 13 A. C. 523). Beginning September 17, pursuant to the demand of Mr. Ratner under the terms of his agreement of May 23, 1921, all checks and payments were in fact turned over to him in the very form in which they were received; and this continued to the time of the delivery of the September 23rd list, and thereafter until the filing of the petition in bankruptcy. There was no further act that was legally required of the assignee in order to perfect his possession of

the choses in action represented by these receivables. There is no way by which an open account can be physically delivered (*Spring* v. *So. Carolina Ins. Co.*, 8 *Wheat*, 268), a condition which is reflected in the rule that an oral assignment of accounts receivable is perfectly valid (*In re McCauley*, 158 Fed. Rep. 322; *Union Trust Co.* v. *Bulkley*, 150 Fed. Rep. 510), and may be asserted against an assignor's trustee in bankruptcy, although the accounts remain in the assignor's possession up to the time of the bankruptcy (*idem*). Indeed, the New York Court of Appeals has directly held that not only may a chose in action be assigned by parol, but a lien upon it can be created by parol (*Williams* v. *Ingersoll*, 89 N. Y. at p. 521). It was not necessary that notice of assignment be given to the debtor in order to make the assignment effectual, even as against attaching creditors (*Williams* v. *Ingersoll, supra*, p. 522), such notice being necessary only to protect an assignee against payment by the debtor to the original creditor (*Heermans* v. *Ellsworth*, 64 N. Y., at p. 161); and merely keeping silence to the creditors, whether known or unknown, created no estoppel (*Grocy* v. *Dockendorff, supra*, p. 516). We might well argue that the various acts of Mr. Ratner in taking possession went beyond what was legally necessary, in view of the nature of the property; whatever may be argued, however, as to Mr. Ratner's rights in other circumstances, it must be clear that as to the accounts collected by him prior to such filing, and as to those included in the September 23rd list, his rights became so fastened, fixed and perfected that, until satisfied, these accounts were withdrawn from the estate to which the receiver

and the trustee later became entitled. *Mr. Ratner perfected his rights by the act of so taking possession*:

> "As soon as *that new act has intervened*, the lien of the creditor becomes perfect, and in the absence of statutory regulation, prevails over the lien of subsequent executions."
>
> *McCaffrey* v. *Woodin*, 65 N. Y., p. 463.

See also,

Grecy vs. *Dockendorff*, 231 U. S. 513;
Wilds v. *Bd. Education*, 227 N. Y., p. 217;
Hovey v. *Elliott*, 118 N. Y. 137;
Matter of Black, 138 A. D. 565;
McDonnell v. *Buffalo &c. Co.*, 193 N. Y. 104.
Gregory v. *Morris*, 96 U. S. 619;
Union Trust Co. v. *Bulkeley*, 150 Fed. Rep. 510;
Sexton v. *Kessler*, 225 U. S. 90;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Young v. *Upson*, 115 Fed. Rep. 192;
Bailey v. *Baker Ice Machine Co.*, 239 U. S., at pp. 275-276.

A study of the cases will show that this "new intervening act"—this *novus actus interveniens*—is the point about which their decision turns. It is discussed at length in *McCaffrey* v. *Woodin* (*supra*), where will be found also a full review of *Holroyd* v. *Marshall* (10 House of Lords Cases, 191), the leading English case on the subject; and many later cases in New York reiterate the rule.

'At law, a mortgage upon property not yet acquired is, according to the authorities, only a license, *until a new act intervenes.* The present case is certainly a license, and if possession be taken by the creditor, there is as much reason to connect the new intervening act with the authority, as though the instrument were in form a mortgage."

McCaffrey v. *Woodin,* 65 N. Y., pp. 464-465.

"Such an instrument, if made in good faith for a valuable consideration and not void as against public policy, operates as an executory contract to transfer such after-acquired property and creates an equitable lien thereon. (*McCaffrey* v. *Woodin, supra; Wisner* v. *Ocumpaugh,* 71 N. Y. 113; *Coats* v. *Donnell,* 94 id. 168; *Kribbs* v. *Alford,* 120 id. 519; *Cooper* v. *Douglass,* DD. *Barb.* 409.) But the legal title remains in the assignor (*Hovey* v. *Elliott,* 118 N. Y. 124, 136), and at law that title is not transferred until either the equitable lien is enforced by judicial decree *or some new act intervenes by which the assignor puts the assignee in possession thereof.* (*McCaffrey* v. *Woodin, supra,* 463, 464)."

Matter of Black, 138 A. D., p. 565.

"And as held in *McCaffrey* v. *Woodin* (*supra*), and *Gregory* v. *Morris* (96 U. S. 619), when with the equitable lien is given the *right to take the property,* the exercise of such right perfects the lien, and enables the party to assert it as a defense or in support of an action founded upon the right resulting from the execution of such power, and is supported by the lien. And in the like case of *Wisner* v. *Ocumpaugh* (71 N. Y. 113),

> the defendant was protected in the exercise of such right and the defense resting upon the lien was deemed equitable."
>
> *Hovey* v. *Elliott,* 118 N. Y., p. 137.

The Circuit Court of Appeals in *Sexton* v. *Kessler* (172 Fed. Rep., at p. 538) well sums up the point, the assignee having taken possession but fourteen days before the filing of the bankruptcy petition:

> "Doubtless a court of equity would not intervene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor; but no such assistance would have been needed, the mortgagor having voluntarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagee. *Hauselt* v. *Harrison,* 105 U. S. 401, 26 L. Ed. 1075; *Wood* v. *U. S. Fidelity Co.* (D. C.), 143 Fed. Rep. 424."
>
> See also same case, 225 U. S., p. 99.

Thus, as between the parties, equity enforces the lien and requires that to be done which the parties agreed should be done; this "equitable lien", however, ripens into a perfected lien and right in law in the event that there be a seizure or taking of the after-acquired property after it comes into possession of the assignee, or if the equivalent be done, viz., filing a supplementary mortgage covering such chattels; such right is enforcible at law against the assignor, and against third parties also, if the intervening act or seizure or recording occur before such third parties ac-

quire a lien upon the property by attachment, levy, bankruptcy, or the like. This principle of "fastening" or perfecting a lien was enlarged upon by the Circuit Court below in its application to the case here considered and is well illustrated in its succinct review of the facts in *Bailey* v. *Baker Ice Machine Co., supra* (fols. 299-301):

> "In that case, Baker Ice Machine Co. had made an agreement with Grant Brothers for the conditional sale of a machine, the title remaining in Baker Co. until the purchase price was fully paid and the machine being in the possession of Grant Brothers.
>
> Under the recording law of Kansas, a contract of conditional sale is valid between the parties whether filed for record or not, but is void as against a creditor of the vendee 'who fastens a lien upon the property by execution, attachment or like legal process before the contract is filed for record.' The contract was made October 14, 1911, and filed for record May 15, 1912. On June 11, 1912, Grant Bros. filed their voluntary petition in bankruptcy and on the following day were adjudged bankrupts. At that time, the chattel which was the subject matter of the controversy was found in the possession of the bankrupts. Between *October 14, 1911,* and *May 15, 1912,* no creditor had 'fastened a lien upon the property by execution, attachment or other legal process.'
>
> It was contended that section 47a, clause 2 of the Bankruptcy Act, as amended in 1910, c. 412, Stat. 830, 840, give a trustee the status of a creditor having such a lien. The court held, however, 'That the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed.'"

When, therefore, Mr. Ratner from time to time received lists specifying the accounts assigned, his lien, thus "fastened" upon and perfected against such accounts, became as enforcible against the later appointed receiver of Hub Carpet Company as the happening of the equivalent event, that of recordation by the Baker Ice Machine Company on May 15, rendered the latter's lien, according to the decision of this Court, enforcible against the later appointed receiver of Grant Brothers.

The facts in *Greey* v. *Dockendorff* (supra), as we read them, went appreciably beyond those in the case at bar. There Dockendorff took by way of security an assignment of all the bankrupt's "accounts receivable thereafter to be created"; within six months after the agreement an involuntary petition was filed; the bankrupt then owed Dockendorff a large sum (p. 515)

> "for advances under the agreement, and he having received assignments of accounts from the bankrupt, as it received orders; that is, after the contract of sale was made, but before the delivery of the goods."

Thus, while Ratner had taken over fixed outstanding accounts and was engaged in their collection at the time of the appointment of the receiver, many of the accounts which Dockendorff claimed had not yet come actually into existence, for they could arise only after shipment following the orders or contracts of sale; the assignments apparently were made against the orders received, and which were thereafter to be shipped. Justice Holmes wrote for this court (p. 516):

> "The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business, but we have no such statute. The advances were the means by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *New York*, 6. N. Y. 179, 57 Am. Dec. 435. We do not see why, in the interval between the acquisition of the goods and the specific assignment of accounts, the right of general creditors without lien should intervene, to defeat a security given in good faith, when, but for the promise of it, the property never would have come into the bankrupt's hands."

Thompson v. *Fairbanks* (supra), seems to us to present a complete parallel to the instant case. There a voluntary petition was filed on June 30, 1900, and an action was brought to recover personal property delivered by the bankrupt to Fairbanks fourteen days previously, pursuant to the terms of a chattel mortgage made long before, which included "all horses and other livery propperty that I (mortgagor) may purchase in my business or acquire by exchange." Intending to perfect his lien under this agreement, the mortgagee took possession of the livery property on May 16, with the consent of the mortgagor, at which time he knew the latter was insolvent and was intending to go into bankruptcy. This Court unanimously sustained the transaction. In doing so, and in recognition of the rule that the local law governs, it reviewed the holdings of the Vermont Courts, the transaction having arisen in that State, and declared that it had been there held (p. 522):

> "that when the mortgagee takes possession of after acquired property, as provided for in this mortgage, the lien is good and valid as against every one but attaching or judgment creditors prior to the taking of such possession.'

We may observe here that such, too, is the established law in the State of New York, as is clear from the cases hereinbefore quoted (*McCaffrey* v. *Woodin, supra; Matter of Black, supra; Hovey* v. *Elliott, supra; McDonnell* v. *Buffalo etc. Co., supra*).

In sustaining the possession of the defendant Fairbanks this Court declared, by Justice Peckham (pp. 524-525):

> "So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking the possession, and such lien can only be avoided by an execution or attachment creditor whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mort-

> gage, yet, if there were no such creditors, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act."

In the cited case goods and chattels were involved and the mortgage was recorded because the state laws permitted and required it; in the instant case choses in action were involved and the assignment was not recorded because the state laws neither permitted nor required it; both instruments were equally valid; in both cases possession was taken to the extent the nature of the property permitted; and we submit *Thompson* v. *Fairbanks* as an authority precisely in point upon the law which governs the case at bar.

POINT II.

Cases which deal with the assignment of intangible property directly sustain the decision here.

Stackhouse v. *Holden,* 66 A. D. (N. Y.) 423 (accounts);
Sexton v. *Kessler,* 225 U. S. 90 (bonds);
Greey v. *Dockendorff,* 231 U. S. 513 (accounts);
Chapman v. *Hunt,* 254 Fed. Rep. 768 (accounts);
In re Michigan Furniture Co., 249 Fed. Rep. 978 (accounts).

In *Stackhouse* v. *Holden* accounts had been assigned as collateral security for the obligation of the assignor, and by the very terms of the

written agreement the latter was *authorized to collect them and use the proceeds as he saw fit until the assignee chose to take over the accounts.* The transaction was upheld. In a single paragraph, the Court summarizes and completely disposes of the whole argument here made by appellant (p. 427):

> "The rule pertaining to a change of possession of goods and chattels upon a sale thereof, or to the filing of a lien thereon, and the dominion required to be exercised by a purchaser, mortgagee or pledgee of tangible property, cannot be applied to a sale or pledge of indebtedness, intangible in itself, only the evidence of which if in writing is perceptible; the conditions are not the same, and the rules of law applicable to transfers of the two classes of property differ; as to one, the possession of which is evidence of ownership, the dealings must be open, visible and public, while as to the other the business may be, as it usually is, private. The necessities of business require it. Aside from the provision of the Bankrupt Law prohibiting preferences, and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit, and any attempt to apply fixed rules for the transaction of the business would interfere with this undoubted right."

Appellant concedes this decision is directly in point; we submit it is the law of this case.

In *Sexton* v. *Kessler, supra,* the bankrupt set aside certain securities for the defendant, reserving the right to use some of them from time to time and to substitute others in their place. With-

drawals and substitutions were made. *Possession of the original and substituted securities was retained by the bankrupt until fourteen days before the filing of a petition in bankruptcy.* At that time possession was delivered to the defendant, who knew that the pledgor had become insolvent. By the unanimous decision of this Court the rights of defendant were upheld. Not one argument here made by appellant was omitted on that appeal; Justice Holmes summarized the point of appellant's whole contention in that case, as in this (225 U. S., p. 97):

> "So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or at least one that is to be preferred to the claim of the trustee. * * *
>
> "The most obvious objection is that the continued physical power of the New York firm over the securities and its right to withdraw and substitute, admittedly reserved, are inconsistent with a title or lien of the English house in any form."

This Court brushed aside the objection thus indicated, as well as the objection that actual delivery of the securities to defendant occurred immediately prior to the bankruptcy and therefore was presumptively fraudulent (p. 99):

> "When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York and in the absence of any controlling statute to the contrary such we understand to be what the law should be. *Parshall* v. *Eggert*, 54 N. Y. 18; *National Bank of Deposit* v. *Rogers*, 166 N. Y. 380."

Plainly the underlying principle of this decision "is this principle of exclusion from the reputed ownership rule," as the Circuit Court of Appeals points out in the case at bar (record, p. 105); indeed, on no other theory could the transaction there have been upheld, since the securities continued in the actual possession of the bankrupt until shortly before the filing of the bankruptcy petition; and this is clear (p. 99, italics ours) from the language of the Court (which at the same time distinguishes some of the cases cited here by appellant):

> "In the case of ordinary goods and chattels, where, for instance, a man mortgages his stock in trade as it may be from time to time, *retaining possession and full power to sell and replace or not as he sees fit*, it well may happen that the security fails. *Skilton* v. *Codington*, 185 N. Y. 80; *Zartman* v. *First National Bank of Waterloo*, 189 N. Y. 267 * * * the subject-matter was not goods and chattels in the sense of the New York mortgage law as we understand that law to be interpreted by the New York Courts.'

See also:

Niles v. *Mathusa*, 162 N. Y. 546;
McNeeley v. *Welz*, 166 N. Y. 128;
Union Trust Co. v. *Bulkeley*, 150 Fed. Rep. 510.

In *Chapman* v. *Hunt*, *supra*, the bankrupt by way of collateral security assigned its accounts receivable under written agreement by which the bankrupt was to collect them and use the proceeds in its business upon assigning to the defendant an equal amount of new accounts. The bankrupt proceeded with the collection of the assigned

accounts, used the proceeds in its business, and furnished monthly to Hunt a list of new assigned accounts stamped with a notice of assignment. This course was pursued for almost a year and a half. The agreement with Hunt was carried out until April 16, 1916, when he was given a new list of receivables. Two days later he arranged that the candy company take up all his notes, advanced the money with which to do so, and as security therefor received assignments of accounts, some of which were new and some of which had theretofore already been assigned to him. Hunt knew at this time, or had reasonable cause to believe, "that the candy works was insolvent." Less than a month later an involuntary petition in bankruptcy was filed against the candy works and an adjudication followed. The Circuit Court unanimously upheld the transaction, declared that the Court below was in error in holding that the transaction of April, 1916 "was an entirely new and independent one, constituting a transfer within four months of the filing of the petition," that Hunt's knowledge in April, 1916, of the company insolvency "did not make the agreement of January 13, 1915, invalid", and directed that the trustee account to Hunt. Here again the underlying "principle of exclusion from the reputed ownership rule" was applied, as pointed out in the opinion of the Court below in the case at bar.

In the last case to which we refer (*re Michigan Furniture Company, supra*) there was, as here, an assignment of accounts with the reserved right of disposal in the assignor. Judge Learned Hand on a review of the cases held the assignment good as against a trustee in bankruptcy.

The industry of appellant has enabled him to cite no cases which hold to the contrary, nor have we found any; and it is clear from the decisions discussed that the assignment here of accounts receivable falls neither within the rule which appellant invokes, nor its reason.

POINT III.

Ostensible ownership arising from physical possession is the basis of the New York rule that a chattel mortgage, though recorded, is void if the mortgagor reserve the right to dispose of the property as his own without accounting therefor to the mortgagee; such also is the principle underlying the chattel mortgage recording acts; controlling decisions exclude accounts receivable from the operation both of the rule and the statute because they are choses in action and are insusceptible of ostensible ownership.

The New York Lien Law (Sec. 230) declares that every

> "mortgage of goods and chattels * * * which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void * * * unless the mortgage or a true copy thereof is filed * * *"

The very language of the Statute shows ostensible ownership arising from physical possession to be its underlying principle. Indeed the phrase

"goods and chattels," commonly used in the various chattel mortgage recording or filing acts throughout the United States, means and is declared to mean only such property as is tangible and susceptible of physical possession; such is the settled law in New York, and elsewhere:

> "The words 'goods and chattels' do not include choses in action, but only personal property which is visible, tangible and movable (*Booth* v. *Kehoe*, 71 N. Y. 341; *State Trust Company* v. *Casino Company*, 19 App. Div. 344; *Haskins* v *.Kelly*, 24 N. Y. Super. Ct. 170; *Bacon* v. *Bonham*, 27 N. J. Eq. 212; *Kilbourne* v. *Fay*, 29 Ohio St. 264; *Marsh* v. *Woodbury*, 1 Metc. 436.)"
>
> *National Hudson Bank* v. *Chaskin*, 28 App. Div. 315.

See also

Niles v. *Mathusa*, 162 N. Y. 546;
Sexton v. *Kessler*, 225 U. S .90;
Re Michigan Furniture Co., 249 Fed. 978;
Greey v. *Dockendorff*, 231 U. S. 513;
Stackhouse v. *Holden*, 66 App. Div. 423.

We contend that it is this theory of visible, tangible possession which underlies also the New York rule that a chattel mortgage is void for presumed fraud, although recorded, where there is no change of possession and the mortgagor reserves the right of disposal for his own benefit.

It should be noted that in many and important states this rule does not obtain.

11 *Corpus Juris*, pp. ~~611-625~~. 562
18 *L. R. A.*, pp. 611-625.

The whole burden of appellant's argument and its fallacy is, that because such mortgages are invalid, despite recording, it follows that the invalidity arises from some doctrine other than that of reputed ownership; and that therefore it applies to personal property of every kind, without distinction, whether capable or incapable of visible physical possession.

Thus, at one sweep, appellant obliterates the distinction between tangible and intangible property which, recognized with the first conceptions of property in things and in rights, and developed historically, has run and still runs markedly through the law and statutes of England and the United States, and which throughout the latter is preserved in the very statutes which deal with chattel mortgages and in the decisions which uniformly interpret "goods and chattels." By the continued use of this phrase in the Recording Acts, our Legislatures have indicated the intention that this distinction continue. (5 *Am. & Eng. Ency. Law,* 2d Ed., pp. 992-993.)

It may be taken for granted that if the courts of New York intended to abolish this distinction and apply the rule in question to all classes of personal property, without exception, we should find in the many decisions which are cited by appellant in his brief at least some reference to that intention; the fact is that no such reference occurs in any of them. Standing alone and apart from the context and the circumstances of the cases in which used, the quotations offered by appellant seem for the moment persuasive, but "according to a familiar rule this language should be regarded as restrained by the circumstances in which it was used" (*Bailey* v. *Baker Ice Ma-*

chine Co. 239 U. S. 275, and cases cited). And *an examination of every case cited or quoted by appellant, without exception, will show that the language was used with reference to "goods and chattels"*—to tangible, not intangible personalty. *In re Leslie-Judge* (272 Fed. Rep. 886) presents no different aspect, for there the question concerned was the pledge of chattels as well as good will, and it was held that since good will is an intangible which cannot exist except as part of and related to the tangibles of a business, the reserved right to dispose of the latter avoided the mortgage as to both. By direct implication the case controverts appellant's position, and supports that of appellee.

It must be apparent from a reading of the cases that the rule under scrutiny has its foundation in ostensible ownership and in nothing else; and that the language used by the courts applied, and was intended to apply, only and solely to "goods and chattels."

Take, for example, the earliest federal and the earliest New York cases, respectively, cited by appellant. *Robinson* v. *Elliott,* (22 Wall. 525), from which appellant quotes at length, was decided in the year 1875; it was in fact the first case before this Court which directly involved the effect upon a chattel mortgage of the reserved power of disposal. The Court remarked that the precise question had "never before been presented" to it, and that "the cases cannot be reconciled by any process of reasoning or on any principles of law." Thereupon it proceeded to place its decision squarely upon the doctrine of ostensible ownership in language that leaves little room for the illusory theory which appellant submits:

> "Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for *men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years.* There was nothing to put creditors on their guard. On the contrary, *this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion.*"

Thus, too, the earliest New York case (no less than the later New York cases) cited by appellant shows clearly that the rule there rests on this same theory of ostensible ownership:

> "There would be no hope of maintaining honesty and fair-dealing, if the courts should allow a mortgagee or vendee to succeed in a claim to personal property against creditors and purchasers, after he had not only (a) left the property in the possession of the debtor, but (b) had allowed him to deal with and dispose of it as his own." (Letters (a) and (b) ours.)
>
> *Griswold* v. *Sheldon,* 4. N. Y. 581, 590.

A consideration of the history of the rule leaves room for no other conclusion. In early English law, the mere failure to change possession rendered the transaction void; the rigor of the rule gradually was relaxed, but never it seems to the extent of validating a transaction where both (a) possession *and* (b) the right of disposal, were reserved. While the Recording Act saved

the transaction where change of possession did not occur, it did not validate the transaction where, *coupled with this reservation of possession, there was reserved also the right of disposal.*

Probably the earliest definite English declaration of the rule and the principle upon which it is based occurs in *Twyne's* case (Coke, Part III, 80-b), decided in 1601, and cited in *Robinson* v. *Elliott, supra.* One Pierce, indebted to Twyne and others, transferred to Twyne his personal property, including sheep, in satisfaction of the debt, but nevertheless continued in possession of the property, "used them as his own," and in due time "shore the sheep and marked them with his own mark." The Court of Star Chamber,* in setting aside the transaction, declared that

> "the donor (a) *continued in possession* and (b) *used them as his own* and that by reason thereof, traded and trafficked with others and defrauded and deceived them." (Letters (a) and (b) ours.)

Later the doctrine was enacted into statute (1623; 21st James I., Ch., XIX), which, as a practice at which it expressly aimed and prohibited, recited a precise definition of this doctrine of reputed ownership:

---

* "Today one who marveled what should be the reason that acts and statutes are continually made at every Parliament without intermission and without end; a wise man made a good and short answer, both which are well composed in verse:

'Quaeritur ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.'"

Twyne's Case, Coke, Part III, 80b.

> "(5) And for that it often falls out, that many Persons before they become Bankrupts, do convey their Goods to other Men upon good consideration, (a) *yet still keep the same,* and are reputed the Owners thereof, and (b) *dispose the same as their own*"—(Letters (a) and (b) ours)—

following which is the declaration that such property shall be seized and sold for the benefit of the creditors of the person in possession. (See "Secret Liens and Reputed Ownership", Elkus and Glenn, p. 176.)

The history of chattel mortgages in England paralleled that of chattel sales; and in time the rule relaxed so that the retention of possession in case of mortgage, just as in the case of sale, constituted only evidence of fraud rather than its absolute badge (*Martindale* v. *Booth,* 3 Bainewall & Adol, 498; *Jones on "Chattel Mortgages",* Sec. 379; *Randall* v. *Cook,* 17 Wend. 53):

At the time of the adoption of our Constitution the tendency in England toward the relaxation of this rule of possession was already clear with respect both to mortgages and sales, but there was no such tendency, so far as we have been able to discover, with respect to cases where continued possession was coupled with the reserved right of disposal; that remained as much a "fraud" in the eyes of the law, after the recording acts, as it had been unchangingly from the time of *Twyne's* case. And this is pointed out in *Robinson* v. *Elliott, supra* (p. 521):

> "It is true the law conferred on the parties the right to agree that the possession of the property could remain with the mortgagor, provided the mortgage be recorded; but if the

mortgage contains other provisions, which, on legal principles, vitiates the whole instrument, it is difficult to see how recording it could make it even *prima facie valid.* The Bill of Sales Registration Act in England makes void all bills of sale not filed as required, if unaccompanied by possession. An eminent writer in speaking of this act says:

"'Of course, the mere fact of due registration of a bill of sale, under this act, does not necessarily make it good against creditors. The act was not passed with a view of making good a title which was not good before, but for the protection of creditors.'"

See also,

Wood v. *Lowry,* 17 Wend. 492.

Thus, while the registration acts enabled possession to remain unchanged where before it had been a badge of fraud, and later but evidence of it, they apparently did not suffice completely to overcome the early idea as to reputed ownership due to possession *plus* the reserved right of disposal. While the recordation validated possession, it did not validate also the reserved right of disposal, and so did not make "good a title which was not good before." But clearly these two conditions or elements are but separate aspects of the same idea as to ownership, as announced in the Twyne case and the Statute of James; and it is impossible to escape the conclusion that both, separately or together, have their basis in reputed ownership flowing from physical possession. The doctrine has certainly no application to the intangible right termed a chose in action. Indeed, the conception of a right or chose in action as apart from the thing itself came much later, his-

torically, than the idea of ownership in the thing and its maintenance by occupation or possession. The very transfer of this right, after its existence became recognized, was at first prohibited "because thought to be a great encouragement to litigousness"; later it was cognizable in equity by way of declaration of trust in the assignor, in whose name alone the assignee was permitted to bring suit (*Bl. Comm., Book 2, Ch. XXV, pp. 338, 397, 441-2*).

Thus the law, distinguishing between chattels personal which on the one hand were capable of physical possession, and on the other were not capable of such possession, developed one set of rules for the one class and another set for the other, just as definitely as it distinguished real property from personal. These distinctions, while still unchanged in this country, have been altered in England by statute so far, at least, as traders' debts are concerned.

> "The rule of the English statute as to reputed ownership may extend to debts growing due to the bankrupt in the course of the business, but we have no such statute."
>
> *Greey* v. *Dockendorff, supra,* p. 515.

See also

Bktcy Act of England (1883) St. 46 &47 Vict. c. 52 sec. 44.

Sexton v. *Kessler,* 225 U. S. 90.

Stackhouse v. *Holden,* 66 A. D. 423.

> "I have found no New York case in which the question here at issue arises, except *Stackhouse* v. *Holden, supra,* which was by a divided court; but upon principle there can be no doubt that there should be no distinction between the reputed ownership arising only from possession and that arising from the

> right to dispose of the property charged. The origin of the doctrine rested upon the putative credit which the possessor was enabled to enjoy by the display of the goods. * * * the rule based upon the possessor's power of disposal in New York arose as an application of the doctrine of reputed ownership of a stock of goods, and should be as much so confined as that doctrine in its other applications."
>
> In re *Michigan Furniture Co., supra.*

There are determining reasons why this doctrine should not be extended, based upon the demands of business, no less than upon the history of the doctrine itself. The requirements of business determined the law merchant; the doctrine and laws of negotiability were evolved to give business the needed freedom in the transfer of obligations; modern business more than ever depends upon the fluidity of accounts and should not be hampered by restraints upon hypothecation, a long favored and often vital mode of procuring immediate financial support. The doctrine, founded upon early rules concerning personal property, seems greatly out of joint with and serves but to hamper modern business conditions; if not abolished or restricted, at least it should certainly not be extended. Such was the view of this Court, when, in considering the phase which dealt with the reserved right of disposal, it wrote:

> "Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought, whether the rulings made

by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. * * * Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking possession by a creditor results in closing the business, and turning the debtor out of employment. * * * The fact that fraudulent relations are possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one unaffected by any settled law of the State, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith, and that the decision of the Supreme Court of Iowa rests on sound principles."

Etheridge v. *Sperry,* 139 U. S., at pp. 277-278.

POINT IV.

The good faith of the transaction is not open to question.

> "There is nothing in this record to warrant even a suggestion of fraud. The loan by Mr. Ratner and the assignment of Hub Carpet Co. of the accounts receivable, constituted a legitimate and businesslike transaction whereby a considerate father was willing to help his son and the latter's associates in maintaining what, at the time, seemed to be a hopeful business. The questions involved, therefore, are solely questions of law."

The Circuit Court below so declared (pp. 99-100, transcript of record), and disposed of the case as one of law.

Having thus treated the matter from the outset, appellant is hardly in a position now to impugn the *bona fides* of the transaction, especially since the very testimony as to secrecy which he quotes and elaborates is but a statement of what the Courts have themselves pointed out as constituting the inherent difference in dealings with tangibles and intangibles:

> "In regard to the secrecy of the lien, it may be observed that every pledge of securities may be and generally is done in secret."
>
> *Stackhouse* v. *Holden, supra,* p. 426.

> "The public was not giving credit to the New York house on the strength of its apparent ownership of these securities because it knew nothing at all about them. The *visible possession* of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors.

* * * * * *There was, however, as to the securities under consideration, no secrecy which was not inherent in their nature. The public does not know what stocks, bonds, or notes a merchant has, and therefore does not give him credit because of them."*

Sexton v. *Kessler,* 172 Fed. Rep., p. 539.

"It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors (*Williams* v. *Ingersoll,* 89 N. Y. 508, 522), and merely keeping silence to the latter, whether known or unknown, created no estoppel (*Wiser* v. *Lawler,* 189 U. S. 260, 270, 47 L. Ed. 802, 809, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630; *Ackerman* v. *True,* 175 N. Y. 353, 363, 67 N. E. 629)."

Greey v. *Dockendorff, supra,* 516.

In view of these decisions we do not feel called upon to follow at length the elaborations of appellant concerning fraud and fraud possibilities. It is sufficient to say that not one word, either direct or indirect, appears that a single creditor was in fact misled or defrauded, despite the lengthy record of ex-parte examinations of third persons which the appellant, as Receiver, saw fit to inject into the case. Mr. Ratner's good faith cannot be affected by the fact that his son, the latter's father-in-law, and others, may have voted emoluments to themselves, properly or not, out of corporate funds; he was never an officer, director or even stockholder of the Carpet Company, nor otherwise in any manner connected with or possessed of a voice in its affairs; his advances to the company against the assigned accounts marked the beginninng and end of his

transactions with it. That Mr. Ratner advanced to the business a total of $30,000 is not disputed. In good faith he enriched the estate to that extent at least, in reliance upon the agreement made at the outset, making an advance of $15,000 barely two months prior to the filing of an involuntary petition in bankruptcy.

There was no fraud in the transaction, either in fact or in law.

IVa. THE FOUR-MONTH RULE DOES NOT APPLY.

The monthly deliveries of lists of accounts receivable, and the taking over of those accounts, relate back to the date of the original agreement, May 23, 1921; so the cases hold, and appellant does not contend otherwise.

> "When the English firm took the securities" (fourteen days before the filing of the bankruptcy petition), 'it only exercised a right that had been created long before the bankruptcy and in good faith.'
>
> *Sexton* v. *Kessler*, 225 U. S. 99.

> "No new right or privilege was then created voidable under the bankrupt act. The delivery of those earmarked securities was in strict pursuance of the agreement made long before on the strength of which the credit was given. *Sabin* v. *Camp* (C. C.), 98 Fed. 974, cited with approval in *Thompson* v. *Fairbanks*, 196 U. S. 516, 524, 25 Sup. Ct. 306, 49 L. Ed. 577.'
>
> *Sexton* v. *Kessler*, 225 U. S. 99.

See also:

Brackett v. *Harvey*, 91 N. Y. 214;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Thompson v. *Fairbanks*, 196 U. S. 516.

POINT V.

Dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be used to procure credit or capital; the constricting rule for which appellant argues would interfere with the facilities of property transfer which business demands and courts uphold.

This, indeed, is the very view expressed by the Appellate Division of New York in the *Stackhouse* case (p. 426):

> "Dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be so used to procure credit or capital."

It is supported by the observations of the Circuit Court in this case:

> "It is a matter of common knowledge that the merchant utilizes his accounts receivable and other kinds of choses in action to keep his business liquid and everyone expects that he may sell or pledge such choses in action for that very purpose."
>
> Folio 312, transcript of record.

And long ago it was expressed by this court:

> "we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith."
>
> *Etheridge* v. *Sperry, supra*, p. 277.

This common practice of thus utilizing receivables has been long ago met by the equally common practice on the part of credit departments to demand a statement specifically of assets pledged as well as of assets and liabilities generally. The answer thus elicited gives all the information that is necessary; indeed, even without such inquiry, we do not see how an honest statement of assets and liabilities can be furnished unless it shows whether or not such a pledge has been made; and the penal laws of New York are adequate to instances of evasion in this regard. Nor does appellant's fear of the dangerous effect of upholding the validity of such a situation as is involved here find the least support in the experiences of the extensive business centres within the States where chattel mortgages are not required to be recorded at all, nor in those where, even though required to be recorded, the reserved right of disposal does not constitute fraud in law. The *Stackhouse* decision has stood unchallenged since 1901, and apparently business has continued in New York without the direful results predicted by appellant. If there had been any such experiences in the business world we would have found, if not decisions to support his position, at least some legislation designed to meet the evil. There are no such decisions, and no such statutes in New York. In any event, *the argument does not go to the validity of the transaction; at most it is addressed to the wisdom of legislative provision for recordation* of such an assignment as is here under consideration.

POINT VI.

The decision of the court below was right and should be affirmed.

All of which is respectfully submitted.

New York, April 14, 1923.

LOUIS S. POSNER.
Counsel for Appellee.

ENB

WALLACE BENEDICT, RECEIVER, *v.* RATNER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 11. Argued October 5, 1923.—Decided May 25, 1925.

1. By the law of New York a transfer of property, as security for a debt, which reserves to the transferor the right to dispose of the property or to apply its proceeds for his own uses, is fraudulent and void as to creditors. P. 360.
2. This rule applies to the assignment of present and future book accounts as well as to assignment of chattels, since it does not result from the retention of ostensible ownership by the assignor, but from the fact that the reservation of dominion by him is inconsistent with the effective disposition of title and creation of a lien. P. 361.
3. *Held* that an assignment made by a mercantile corporation, more than four months before it was adjudged bankrupt, of its present and future accounts receivable as security for a loan, was void under the above rule, so that delivery of a list of accounts, and payments made within the four months, were inoperative to perfect a

lien in the assignee, but were unlawful preferences, under the Bankruptcy Act. P. 364.
282 Fed. 12, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed an order of the District Court requiring a receiver and trustee in bankruptcy to pay over money collected from accounts receivable to a creditor of the bankrupt claiming them as security under an assignment, and denying the trustee's petition that the creditor be required to pay over collections made by him under the assignment.

Mr. Selden Bacon, for petitioner.

A contemporaneous agreement that, despite an assignment of property as collateral security to secure the assignee for a debt due him from the assignor, the assignor may continue to use and dispose of the property as his own, retaining and using the proceeds in his business, without accounting therefor in any way to his assignee, renders the assignment fraudulent and void as against creditors, not only in the case of ordinary chattel mortgages but also in the case of assignments confined to accounts receivable. *In re Leslie-Judge Co.,* 272 Fed. 886; *Russell* v. *Winne,* 37 N. Y. 591; *Skilton* v. *Codington,* 185 N. Y. 80; *Griswold* v. *Sheldon,* 4 N. Y. 581; *Southard* v *Benner,* 72 N. Y. 424; *Zartman* v. *First Natl. Bank,* 189 N. Y. 267; *In re Volence,* 197 Fed. 232; *Robinson* v. *Elliot,* 22 Wall, 513.

Cases implying that the rule is not based on any appearance growing out of possession but on the fraudulent character of the arrangement, we find in abundance. See cases above cited, and *Wood* v. *Lowry,* 17 Wend. 492; *Edgell* v. *Hart,* 9 N. Y. 213; *Vilas Bank* v. *Newton,* 25 App. Div. N. Y., 62, 66; *Mittnach* v. *Kelly,* 3 Abb. Ct. App. Dec. 301; *Gardner* v. *McEwen,* 19 N. Y. 123; *In re Marine Construction Co.,* 144 Fed. 649; *Worrall* v. *Smith,* 1 Camp. 322; *Paget* v. *Perchard,* 1 Esp. 205.

The decisions in *Sexton* v. *Kessler*, 225 U. S. 90, and in *Chapman* v. *Hunt*, 254 Fed. 768, in no way conflict with the rule we invoke.

Even were the rule predicated on a false appearance of ownership, the facts here supply the equivalent, and more than the equivalent, of any false appearance of ownership arising from possession of tangibles. There was the actual appearance of ownership deliberately preserved and sustained, and deliberate concealment of the assignment to avoid the obvious and contemplated consequences of disclosure of the fact of the assignment of all receivables present and future.

If the assignment was galvanized into actuality by Ratner's taking over the checks as they came in, during the last week before the bankruptcy, that galvanization process went no further than his actual receipts of about $12,000, and the decree for further payment to him of some $18,000 is erroneous. Moreover as to the $12,000 the transaction was preferential. The main question presented is of the utmost importance to the business community and to the administration of the Bankruptcy Act.

Mr. Louis S. Posner, for respondent.

An assignment of property to be acquired thereafter operates by way of present contract to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the assignor. Such lien becomes perfected and ripens into a right at law which is enforcible against third parties if, after the property is acquired, the assignee take possession thereof prior to an execution or attachment levy thereon, or the like, by third parties, or the appointment of a receiver upon the filing of a petition in bankruptcy by or against the assignor. *McCaffrey* v. *Woodin*, 65 N. Y. 463; *Thompson* v. *Fairbanks*, 196 U. S. 516.

The facts here constitute the equivalent, and more than the equivalent, of taking possession of the accounts re-

ceivable to the full extent that the nature of these choses in action permitted. And since this was done before any third parties had "fastened" a lien, it is enforcible against third parties, including the receiver in bankruptcy and his successor trustee. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 275–276; *Thompson* v. *Fairbanks, supra; McCaffrey* v. *Woodin, supra; Sexton* v. *Kessler*, 225 U. S. 90.

The agreement in question was not recorded because the recording acts of New York permit this to be done only with reference to "goods and chattels," and exclude choses in action from their operation. *Niles* v. *Methusa*, 162 N. Y. 546. The four-month rule does not apply to the situation, since the intervening acts by which possession was taken of the after-acquired accounts relate back to the date of the original agreement, which took place more than four months previously. *Bracket* v. *Harvey*, 91 N. Y. 214; *Thompson* v. *Fairbanks, supra; Sexton* v. *Kessler, supra.* Such cases as have been found which deal with the assignment of intangibles or choses in action, present or future, such as accounts, bonds, and the like, sustain the position of the appellee and entitle him to the proceeds of the balance of the accounts, at least of those accounts which were included in the list last delivered to him, until his loans are repaid in full with interest. *Stackhouse* v. *Holden*, 66 A. D. (N. Y.) 423; *Sexton* v. *Kessler, supra; Greey* v. *Dockendorff*, 231 U. S. 516; *In re Michigan Furniture Company*, 249 Fed. 974; *Union Trust* v. *Bulkeley*, 150 Fed. 510; *In re McCauley*, 158 Fed. 332. No question of good faith exists in the case based upon the secrecy of the transaction, which we maintain to be a condition inherent in it and which the courts so recognize. *Greey* v. *Dockendorff, supra; Stackhouse* v. *Holden, supra.*

It is the law in New York that a mortgage of goods and chattels wherein the mortgagor reserves the right of

disposal, for his own benefit, is deemed fraudulent in law and void. The rule rests in the original conception that the visible possession of personal property indicated ownership,—a condition which cannot in its nature apply to such intangible property as choses in action, and which has never been held so to apply in any decisions which we have been able to find or which the appellant cites. The doctrine in question, based upon the conceptions of reputed ownership in the days when rights of property had their beginnings, must be deemed to be greatly out of joint with modern conceptions of industry and modes of possession; in any event, the doctrine, if it cannot be disregarded, should at least be limited and held within its present confines rather than extended into a field where it never before has played a part and where it can but serve as an embarrassment to business. Such considerations of public interest as here exist point clearly that way, particularly since those who enter into business relations know full well that the utilization of accounts receivable, in order to keep business liquid, is one of the commonest practices of everyday business.

Mr. Justice Brandeis delivered the opinion of the Court.

The Hub Carpet Company was adjudicated bankrupt by the federal court for southern New York in involuntary proceedings commenced September 26, 1921. Benedict, who was appointed receiver and later trustee, collected the book accounts of the company. Ratner filed in that court a petition in equity praying that the amounts so collected be paid over to him. He claimed them under a writing given May 23, 1921—four months and three days before the commencement of the bankruptcy proceedings. By it the company purported to assign to him, as collateral for certain loans, all accounts present and future. Those collected by the receiver were, so far as

ceivable to the full extent that the nature of these choses in action permitted. And since this was done before any third parties had "fastened" a lien, it is enforcible against third parties, including the receiver in bankruptcy and his successor trustee. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 275–276; *Thompson* v. *Fairbanks, supra; McCaffrey* v. *Woodin, supra; Sexton* v. *Kessler*, 225 U. S. 90.

The agreement in question was not recorded because the recording acts of New York permit this to be done only with reference to "goods and chattels," and exclude choses in action from their operation. *Niles* v. *Methusa*, 162 N. Y. 546. The four-month rule does not apply to the situation, since the intervening acts by which possession was taken of the after-acquired accounts relate back to the date of the original agreement, which took place more than four months previously. *Bracket* v. *Harvey*, 91 N. Y. 214; *Thompson* v. *Fairbanks, supra; Sexton* v. *Kessler, supra.* Such cases as have been found which deal with the assignment of intangibles or choses in action, present or future, such as accounts, bonds, and the like, sustain the position of the appellee and entitle him to the proceeds of the balance of the accounts, at least of those accounts which were included in the list last delivered to him, until his loans are repaid in full with interest. *Stackhouse* v. *Holden*, 66 A. D. (N. Y.) 423; *Sexton* v. *Kessler, supra; Greey* v. *Dockendorff*, 231 U. S. 516; *In re Michigan Furniture Company*, 249 Fed. 974; *Union Trust* v. *Bulkeley*, 150 Fed. 510; *In re McCauley*, 158 Fed. 332. No question of good faith exists in the case based upon the secrecy of the transaction, which we maintain to be a condition inherent in it and which the courts so recognize. *Greey* v. *Dockendorff, supra; Stackhouse* v. *Holden, supra.*

It is the law in New York that a mortgage of goods and chattels wherein the mortgagor reserves the right of

disposal, for his own benefit, is deemed fraudulent in law and void. The rule rests in the original conception that the visible possession of personal property indicated ownership,—a condition which cannot in its nature apply to such intangible property as choses in action, and which has never been held so to apply in any decisions which we have been able to find or which the appellant cites. The doctrine in question, based upon the conceptions of reputed ownership in the days when rights of property had their beginnings, must be deemed to be greatly out of joint with modern conceptions of industry and modes of possession; in any event, the doctrine, if it cannot be disregarded, should at least be limited and held within its present confines rather than extended into a field where it never before has played a part and where it can but serve as an embarrassment to business. Such considerations of public interest as here exist point clearly that way, particularly since those who enter into business relations know full well that the utilization of accounts receivable, in order to keep business liquid, is one of the commonest practices of everyday business.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Hub Carpet Company was adjudicated bankrupt by the federal court for southern New York in involuntary proceedings commenced September 26, 1921. Benedict, who was appointed receiver and later trustee, collected the book accounts of the company. Ratner filed in that court a petition in equity praying that the amounts so collected be paid over to him. He claimed them under a writing given May 23, 1921—four months and three days before the commencement of the bankruptcy proceedings. By it the company purported to assign to him, as collateral for certain loans, all accounts present and future. Those collected by the receiver were, so far as

appears, all accounts which had arisen after the date of the assignment, and were enumerated in the monthly list of accounts outstanding which was delivered to Ratner September 23. Benedict resisted the petition on the ground that the original assignment was void under the law of New York as a fraudulent conveyance; that, for this reason, the delivery of the September list of accounts was inoperative to perfect a lien in Ratner; and that it was a preference under the Bankruptcy Act. He also filed a cross-petition in which he asked that Ratner be ordered to pay to the estate the proceeds of certain collections which had been made by the company after September 17 and turned over to Ratner pursuant to his request made on that day. The company was then insolvent and Ratner had reason to believe it to be so. These accounts also had apparently been acquired by the company after the date of the original assignment.

The District Judge decided both petitions in Ratner's favor. He ruled that the assignment executed in May was not fraudulent in law; that it created an equity in the future acquired accounts; that because of this equity, Ratner was entitled to retain, as against the bankrupt's estate, the proceeds of the accounts which had been collected by the company in September and turned over to him; that by delivery of the list of the accounts outstanding on September 23, this equity in them had ripened into a perfect title to the remaining accounts; and that the title so perfected was good as against the supervening bankruptcy. Accordingly, the District Court ordered that, to the extent of the balance remaining unpaid on his loans, there be paid Ratner all collections made from accounts enumerated in any of the lists delivered to Ratner; and that the cross-petition of Benedict be denied. There was no finding of fraud in fact. On appeal, the Circuit Court of Appeals affirmed the order. 282 Fed. 12. A writ of certiorari was granted by this Court. 259 U. S. 579.

The rights of the parties depend primarily upon the law of New York. *Hiscock* v. *Varick Bank of N. Y.*, 206 U. S. 28. It may be assumed that, unless the arrangement of May 23 was void because fraudulent in law, the original assignment of the future acquired accounts became operative under the state law, both as to those paid over to Ratner before the bankruptcy proceedings and as to those collected by the receiver;[1] and that the assignment will be deemed to have taken effect as of May 23. *Sexton* v. *Kessler*, 225 U. S. 90, 99. That being so, it is clear that, if the original assignment was a valid one under the law of New York, the Bankruptcy Act did not invalidate the subsequent dealings of the parties. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91. The sole question for decision is, therefore, whether on the following undisputed facts the assignment of May 23 was in law fraudulent.

The Hub Carpet Company was, on May 23, a mercantile concern doing business in New York City and proposing to continue to do so. The assignment was made there to secure an existing loan of $15,000, and further advances not exceeding $15,000 which were in fact made July 1, 1921. It included all accounts receivable then outstanding and all which should thereafter accrue in the ordinary course of business. A list of the existing accounts was delivered at the time. Similar lists were to be delivered to Ratner on or about the 23d day of each succeeding month containing the accounts outstanding at such future dates. Those enumerated in each of the lists delivered prior to September, aggregated between $100,000 and $120,000. The receivables were to be collected by the company. Ratner was given the right, at any time, to

[1] *Williams* v. *Ingersoll*, 89 N. Y. 508, 518–520; *Coats* v. *Donnell*, 94 N. Y. 168, 177. See *Rochester Distilling Co.* v. *Rasey*, 142 N. Y. 570, 580; *MacDowell* v. *Buffalo Loan, etc. Co.*, 193 N. Y. 92, 104. Compare *New York Security & Trust Co.* v. *Saratoga Gas, etc. Co.*, 159 N. Y. 137; *Zartman* v. *First National Bank*, 189 N. Y. 267.

demand a full disclosure of the business and financial conditions; to require that all amounts collected be applied in payment of his loans; and to enforce the assignment although no loan had matured. But until he did so, the company was not required to apply any of the collections to the repayment of Ratner's loan. It was not required to replace accounts collected by other collateral of equal value. It was not required to account in any way to Ratner. It was at liberty to use the proceeds of all accounts collected as it might see fit. The existence of the assignment was to be kept secret. The business was to be conducted as theretofore. Indebtedness was to be incurred, as usual, for the purchase of merchandise and otherwise in the ordinary course of business. The amount of such indebtedness unpaid at the time of the commencement of the bankruptcy proceedings was large. Prior to September 17, the company collected from accounts so assigned about $150,000, all of which it applied to purposes other than the payment of Ratner's loan. The outstanding accounts enumerated in the list delivered September 23 aggregated $90,000.

Under the law of New York a transfer of property as security which reserves to the transferor the right to dispose of the same, or to apply the proceeds thereof, for his own uses is, as to creditors, fraudulent in law and void.[2]

[2] *Griswold* v. *Sheldon*, 4 N. Y. 580; *Edgell* v. *Hart*, 9 N. Y. 213; *Russell* v. *Winne*, 37 N. Y. 591; *Southard* v. *Benner*, 72 N. Y. 424; *Potts* v. *Hart*, 99 N. Y. 168; *Hangen* v. *Hachemeister*, 114 N. Y. 566; *Mandeville* v. *Avery*, 124 N. Y. 376; *Skilton* v. *Codington*, 185 N. Y. 80; *Zartman* v. *First National Bank*, 189 N. Y. 267; *In re Marine Construction & Dry Docks Co.*, 135 Fed. 921, 144 Fed. 649; *In re Davis*, 155 Fed. 671; *In re Hartman*, 185 Fed. 196; *In re Volence*, 197 Fed. 232; *In re Purtell*, 215 Fed. 191; *In re Leslie-Judge Co.*, 272 Fed. 886. Compare *Frost* v. *Warren*, 42 N. Y. 204; also *Lukins* v. *Aird*, 6 Wall. 78; *Robinson* v. *Elliot*, 22 Wall. 513; *Smith* v. *Craft*, 123 U. S. 436; *Means* v. *Dowd*, 128 U. S. 273; *Etheridge* v. *Sperry*, 139 U. S. 266; *Huntley* v. *Kingman*, 152 U. S. 527; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545.

This is true whether the right of disposition for the transferor's use be reserved in the instrument [3] or by agreement *in pais*, oral or written;[4] whether the right of disposition reserved be unlimited in time [5] or be expressly terminable by the happening of an event;[6] whether the transfer cover all the property of the debtor [7] or only a part;[8] whether the right of disposition extends to all the property transferred [9] or only to a part thereof;[10] and whether the instrument of transfer be recorded or not.[11]

If this rule applies to the assignment of book accounts, the arrangement of May 23 was clearly void; and the equity in the future acquired accounts, which it would otherwise have created,[12] did not arise. Whether the rule applies to accounts does not appear to have been passed upon by the Court of Appeals of New York. But it would seem clear that whether the collateral consist of chattels

[3] *Edgell* v. *Hart*, 9 N. Y. 213, 216; *Zartman v. First National Bank*, 189 N. Y. 267, 270.

[4] *Russell* v. *Wynne*, 37 N. Y. 591, 595; *Southard* v. *Benner*, 72 N. Y. 424, 432; *Potts* v. *Hart*, 99 N. Y. 168, 172–173.

[5] *Southard* v. *Benner*, 72 N. Y. 424, 430; *Potts* v. *Hart*, 99 N. Y. 168, 172.

[6] *Zartman* v. *First National Bank*, 189 N. Y. 267, 270.

[7] *Zartman* v. *First National Bank*, 189 N. Y. 267, 269.

[8] *Russell* v. *Winne*, 37 N. Y. 591; *Southard* v. *Benner*, 72 N. Y. 424.

[9] *Potts* v. *Hart*, 99 N. Y. 168, 172.

[10] *Russell* v. *Winne*, 37 N. Y. 591, 593; *In re Leslie-Judge Co.*, 272 Fed. 886, 888.

[11] *Potts* v. *Hart*, 99 N. Y. 168, 171. N. Y. Personal Property Law, § 45; Laws, 1911, c. 626, authorizes the creation of a general lien or floating charge upon a stock of merchandise, including after-acquired chattels, and upon accounts receivable resulting from the sale of such merchandise. It provides that this lien or charge shall be valid against creditors provided certain formalities are observed and detailed filing provisions are complied with. It is possible that, if its conditions are performed, the section does away with the rule "that retention of possession by the mortgagor with power of sale for his own benefit is fraudulent as to creditors."

[12] *Field* v. *Mayor, etc. of New York*, 6 N. Y. 179.

or of accounts, reservation of dominion inconsistent with the effective disposition of title must render the transaction void. Ratner asserts that the rule stated above rests upon ostensible ownership, and argues that the doctrine of ostensible ownership is not applicable to book accounts. That doctrine raises a presumption of fraud where chattels are mortgaged (or sold) and possession of the property is not delivered to the mortgagee (or vendee).[13] The presumption may be avoided by recording the mortgage (or sale). It may be assumed, as Ratner contends, that the doctrine does not apply to the assignment of accounts. In their transfer there is nothing which corresponds to the delivery of possession of chattels. The statutes which embody the doctrine and provide for recording as a substitute for delivery do not include accounts. A title to an account good against creditors may be transferred without notice to the debtor[14] or record of any kind.[15] But it is

[13] *Smith* v. *Acker*, 23 Wend. 653; *Griswold* v. *Sheldon*, 4 N. Y. 580, 590; *Edgell* v. *Hart*, 9 N. Y. 213, 218; *Conkling* v. *Shelley*, 28 N. Y. 360. The statutes to this effect merely embody the common-law rule. But, in New York, an additional statute provides that unrecorded chattel mortgages under such circumstances are absolutely void as to creditors. New York Lien Law, § 230; Laws, 1909, c. 38, § 230, as amended 1911, c. 326, and 1916, c. 348. See *Seidenbach* v. *Riley*, 111 N. Y. 560; *Karst* v. *Kane*, 136 N. Y. 316; *Stephens* v. *Perrine*, 143 N. Y. 476; *Russell* v. *St. Mart*, 180 N. Y. 355. See *Stewart* v. *Platt*, 101 U. S. 731, 735. Compare *Preston* v. *Southwick*, 115 N. Y. 139; *Nash* v. *Ely*, 19 Wend. (N. Y.) 523; *Goodwin* v. *Kelly*, 42 Barb. (N. Y.) 194. In the case of a transfer of personal property by sale, retention of possession creates a rebuttable presumption of fraud. See *Kimball* v. *Cash*, 176 N. Y. Supp. 541; also *New York Ice Co.* v. *Cousins*, 23 App. Div. 560; *Rheinfeldt* v. *Dahlman*, 43 N. Y. Supp. 281; *Tuttle* v. *Hayes*, 107 N. Y. Supp. 22; *Young* v. *Wedderspoon*, 126 N. Y. Supp. 375; *Sherry* v. *Janov*, 137 N. Y. Supp. 792; *Gisnet* v. *Moeckel*, 165 N. Y. Supp. 82. In order to create a valid pledge of tangible personalty, there must be a delivery to the pledgee. *In re P. J. Sullivan Co.*, 247 Fed. 139, 254 Fed. 660.

[14] *Williams* v. *Ingersoll*, 89 N. Y. 508, 522.

[15] *Niles* v. *Mathusa*, 162 N. Y. 546; *National Hudson River Bank* v. *Chaskin*, 28 App. Div. 311, 315; *Curtis* v. *Leavitt*, 17 Barb. (N. Y.)

not true that the rule stated above and invoked by the receiver is either based upon or delimited by the doctrine of ostensible ownership. It rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved. It does not raise a presumption of fraud. It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien.

The nature of the rule is made clear by its limitations. Where the mortgagor of chattels agrees to apply the proceeds of their sale to the payment of the mortgage debt or to the purchase of other chattels which shall become subject to the lien, the mortgage is good as against creditors, if recorded.[16] The mortgage is sustained in such cases "upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish. It devotes, as it should, the mortgaged property to the payment of the mortgage debt." The permission to use the proceeds to furnish substitute collateral "provides only for a shifting of the lien from one piece of property to another taken in exchange." *Brackett* v. *Harvey*, 91 N. Y. 214, 221, 223.

309, 364; *Young* v. *Upson*, 115 Fed. 192. In 1916, Section 230 of the New York Lien Law was amended to the effect that a mortgage, pledge, or lien on stocks or bonds given to secure the repayment of a loan is, if not recorded, absolutely void against creditors unless such securities are delivered to the mortgagee or pledgee on the day the loan is made. See N. Y. Laws, 1916, c. 348.

[16] *Conkling* v. *Shelley*, 28 N. Y. 360; *Brackett* v. *Harvey*, 91 N. Y. 214; *Spaulding* v. *Keyes*, 125 N. Y. 113; *Briggs* v. *Gelm*, 122 App. Div. 102. See *Robinson* v. *Elliot*, 22 Wall. 513, 524; *People's Savings Bank* v. *Bates*, 120 U. S. 556, 561.

On the other hand, if the agreement is that the mortgagor may sell and use the proceeds for his own benefit, the mortgage is of no effect although recorded. Seeming ownership exists in both classes of cases because the mortgagor is permitted to remain in possession of the stock in trade and to sell it freely. But it is only where the unrestricted dominion over the proceeds is reserved to the mortgagor that the mortgage is void. This dominion is the differentiating and deciding element. The distinction was recognized in *Sexton* v. *Kessler*, 225 U. S. 90, 98, where a transfer of securities was sustained.[17] It was pointed out that a reservation of full control by the mortgagor might well prevent the effective creation of a lien in the mortgagee and that the New York cases holding such a mortgage void rest upon that doctrine.

The results which flow from reserving dominion inconsistent with the effective disposition of title must be the same whatever the nature of the property transferred. The doctrine which imputes fraud where full dominion is reserved must apply to assignments of accounts although the doctrine of ostensible ownership does not. There must also be the same distinction as to degrees of dominion. Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies,[18] the assignment must be deemed fraudulent in law if it is agreed that the assignor may use the proceeds as he sees fit.

In the case at bar, the arrangement for the unfettered use by the company of the proceeds of the accounts pre-

[17] See note 18, *infra*.

[18] *Young* v. *Upson*, 115 Fed. 192. If it is agreed that the transferor may use the original collateral for his own purposes upon the substitution of other of equal value, the transfer is not thereby invalidated. *Clark* v. *Iselin*, 21 Wall. 360 (book accounts); *Sexton* v. *Kessler*, 225 U. S. 90 (negotiable securities); *Chapman* v. *Hunt*, 254 Fed. 768 (book accounts). Compare *Casey* v. *Cavaroc*, 96 U. S. 467.

cluded the effective creation of a lien [19] and rendered the original assignment fraudulent in law. Consequently the payments to Ratner and the delivery of the September list of accounts were inoperative to perfect a lien in him, and were unlawful preferences.[20] On this ground, and also because the payment was fraudulent under the law of the State, the trustee was entitled to recover the amount.[21]

Stackhouse v. *Holden*, 66 App. Div. 423, is relied upon by Ratner to establish the proposition that reservation of dominion does not invalidate an assignment of accounts. The decision was by an intermediate appellate court, and, although decided in 1901, appears never to have been cited since in any court of that State.[22] There was a strong dissenting opinion. Moreover, the case is perhaps distinguishable on its facts, p. 426. *Greey* v. *Dockendorff*, 231 U. S. 513, upon which Ratner also relies, has no bearing on the case at bar. It involved assignment of accounts, but there was no retention of dominion by the bankrupt. The sole question was whether successive assignments of accounts by way of security, made in pursuance of a contract, were bad because the contract embraced all the accounts. The lien acquired before knowledge by either party of insolvency was held good against the trustee.

Reversed.

---

[19] Compare *Mechanics' Bank* v. *Ernst*, 231 U. S. 60, 67.

[20] *Schaupp* v. *Miller*, 206 Fed. 575; *Grimes* v. *Clark*, 234 Fed. 604; *Gray* v. *Breslof*, 273 Fed. 526, 527.

[21] *Mandeville* v. *Avery*, 124 N. Y. 376, 382; *Stimson* v. *Wrigley*, 86 N. Y. 332, 338; *Dutcher* v. *Swartwood*, 15 Hun (N. Y.) 31.

[22] It was cited in *Young* v. *Upson*, 115 Fed. 192 (Circ. Ct.); *In re Michigan Furniture Co.*, 249 Fed. 978 (D. Ct.); and in the opinion here under review.